Supreme Court, U.S.
FILED
09-358 SEP 21 2009
OFFICE OF THE CLERK

No. ____

In The

SUPREME COURT OF THE UNITED STATES

MING WEI LIU,

Petitioner

v.

ROBERT C. BOURGE,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case involves important questions of federal law that has not been, but should be, settled by this Court concerning the effect of the Healthcare Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11101, *et seq.* on the relationship among peer review authorities acting on behalf of healthcare entities in different states.

The questions presented are:

I.

Whether the invocation of facially inapplicable Alabama statutory evidentiary privileges to preclude a hospital from providing peer review information to bona fide credentials authorities in sister states violates a physician's federal rights under the Quality Healthcare Improvement Act of 1986 and the due process clause of the Fourteenth Amendment.

II.

Whether the Congressional purpose for the enactment of the Healthcare Quality Improvement Act

of 1986 included the protection of physicians from the knowing interstate dissemination of false and stigmatizing peer review conclusions among healthcare entities conducting peer review activities, while arbitrarily withholding the underlying peer review information supporting or refuting those conclusions from healthcare entities requesting it for purposes of mandated peer review activities .

III.

Whether knowingly false statements of professional incompetency published by a state healthcare entity agent to university teaching hospital peer review participants considering an application for staff privileges as a requisite to a medical school academic appointment unconstitutionally blacklists the Petitioner.

LIST OF PARTIES

The identities of all parties to the proceeding whose judgment is sought to be reviewed are contained in the caption of this case.

RULE 29.6

There are no corporate parties in this case.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit Court of Appeals is unpublished. A copy thereof appears at Appendix A. The order denying a Petition for Rehearing is unpublished. A copy thereof appears at Appendix B. The opinion of the United States District Court for the Northern District of Alabama is unpublished. A copy thereof appears at Appendix C.

JURISDICTION

This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

The judgment or order sought to be reviewed was entered by a panel of the Eleventh Circuit Court of Appeals on May 19, 2009. (Appendix A).

A petition for rehearing was denied on June 23, 2009. (Appendix B).

RELEVANT PROVISIONS INVOLVED

1.

United States Constitution Article VI - Supremacy Clause:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and

all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

2.

United States Constitution Fourteenth Amendment, § 1 - Due Process Clause:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3.

Healthcare Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11111, et seq.

Pertinent Provisions reproduced at Appendix D

4.

Ala. Code § 6-5-333(d):

> All information, interviews, reports, statements, or memoranda furnished to any [peer-review committee], and any findings, conclusions, or recommendations resulting from the proceedings of such committee are declared to be privileged. The records and proceedings of any such committees shall be confidential and shall be used by such committee and the members thereof only in the exercise of the proper functions of the committee and shall not be public records . . .

5.

Ala. Code § 22-21-8(b):

> All accreditation, quality assurance credentialing and similar materials shall be held in

confidence and shall not be subject to discovery or introduction in evidence in any civil action against a healthcare professional or institution arising out of matters which are the subject of evaluation and review for accreditation, quality assurance and similar functions, purposes, or activities. No person involved in preparation, evaluation or review of accreditation, quality assurance or similar materials shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the course of preparation, evaluation, or review of such materials or as to any finding, recommendation, evaluation, opinion, or other action of such accreditation, quality assurance or similar function or other person involved therein.

STATEMENT OF THE CASE

The facts stated in the opinion of the Court of Appeals at pp. 2 - 3, though incomplete, are undisputed:

Liu is a cardiologist who, between 1991 and

2001, was a tenured Associate Professor of Medicine at the University of Alabama Birmingham ("UAB").[1] In 2001, the director of the Division of Cardiovascular Research at UAB Dr. Robert Bourge ("Bourge") summarily suspended Liu's clinical privileges and instituted a "peer review" investigation of Liu's clinical privileges. Upon the advice of counsel, Liu submitted his resignation before the investigation was completed. As required by the Healthcare Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11111, et seq., UAB reported Liu's resignation during the pendency of an investigation to the National Practitioner Data Bank ("NPDB").

After resigning from his position at UAB, Liu applied for a professorship at the University of Southern California Hospital ("USC"). As a part of his application for staff privileges, USC asked Liu to request that UAB forward certain peer review information to USC, so that it could evaluate the report

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1 The abbreviations in the opinion of the Court of Appeals are adopted in this Petition.

on the NPDB. Instead of sending the requested peer review information, Bourge sent a "recommendation letter" to USC stating that Liu was placed on probation and was being investigated because his "performed procedures, planned procedures, certain aspects of medical care, and his hospital chart documentation were not within the standard of care at our institution." Upon receiving this letter, USC again requested additional peer review information regarding the cases Bourge asserted were not within UAB's "standard of care." UAB invoked Alabama state medical peer review privilege, Ala. Code §§ 6-5-333 and 22-21-8 ("peer review privilege")[2], and refused to provide the peer review information concerning Liu to USC. Since

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2 The district court and the Court of Appeals avoided the question of the applicability of the state peer review privilege to the facts of this case. Although both courts effectively permitted the use of this facially inapplicable privilege to block peer review entity to peer review entity disclosure of peer review information, both also sought to avoid the direct issue as explained in the Court of Appeals decision at fn. 3: "Liu also argues that the district court erred in its "threshold conclusion" that the Alabama peer review privilege could be invoked to refuse to provide peer review information properly requested by a hospital in another state. The district court, however, did not actually reach this conclusion; rather, it considered whether the peer review privilege, as it was asserted by Bourge, violated Liu's constitutional rights."

the USC credentialing committee did not receive the requested peer review information, the USC credentialing committee denied Liu's application for staff privileges as incomplete. After being denied staff privileges at USC, Liu was eventually granted clinical privileges at several hospitals in the Los Angeles, California area, where he is currently practicing medicine.[3]

To complete this fact statement to the extent necessary for an adequate analysis of the issues, Article XI of the University of Alabama Health System Bylaws (Appellate Record Doc 16 - Pg 34), a material portion of the record ignored by the district and appeals court must be considered..

Section 11.1(b) and (c) of the Bylaws recognize UAB's obligation to facilitate the free exchange of peer review information, including records and recommendations, among entities entitled to that

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3 Liu has not been admitted to the staff of any university hospital in California; a requisite to appointment to any clinical medical professorship.

otherwise confidential information.

Section (b) provides that by applying for appointment or reappointment to the medical staff (and related activities), the applicant:

> Authorizes third parties to release information, including otherwise privileged or confidential information, as well as reports, records, statements, recommendations and other documents in their possession, bearing on the applicant's credentials to any Representative [of the Hospital] and consents to the inspection and procurement by any Representative of such information, records and other documents.

Section (c) provides that the applicant:

> Authorizes the Representatives to release such information to other hospitals, healthcare facilities and their agents, who solicit such information, (either directly or through delegated credentialing activities UABHS

Clinical Facilities) for the purpose of evaluating the individual's professional qualifications pursuant to the individual's request for appointment, reappointment or clinical privileges.

REASONS FOR GRANTING THE WRIT

As to the first question presented for review, the Court of Appeals accurately states the standards for assessing any conflict between state and federal law to determine the effect, if any, of the Supremacy clause of the United States Constitution. Congressional intent in enacting the federal law involved is the "ultimate touchstone", and an application of a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" fails constitutional scrutiny. Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 604-05 (1991). The Court of Appeals failed however to properly apply the test to the facts and circumstances of this case.

The issue which Petitioner urges this Court to review arises from the Court of Appeals' reading of the language used by Congress in its enactment of the HCQIA as a legislative statement of intent, to wit: that healthcare entities conducting mandated healthcare reviews are only entitled under the HCQIA to obtain the minimal information required to be reported to the NPDB from healthcare entities that conducted prior peer review activities concerning an applicant for staff privileges. This interpretation ignores the plain language of the HCQIA, fails to apply the cannons of construction for the interpretation of "statutory scheme" legislation, and fails to defer to the regulations adopted by the U.S. Department of Health and Human Services, the agency responsible for the implementation of the Act. Federal Register, October17, 1989, codified at 45 CFR Part 60.

Petitioner respectfully urges this Court to grant the writ of certiorari to and evaluate the Court of Appeals' narrow interpretation of Congressional intent in the enactment of the HCQIA. The decision of the

Court of Appeals was premised solely upon its seemingly inconsistent statements that, "Congress enacted the HCQIA to both 'facilitate the frank exchange' of information among professionals conducting peer review inquiries without fear of reprisal in civil lawsuits" (Citation Omitted)(Court's Underlining)(Appendix A, p. 43, 45), and, "to insure that some minimal amount of information regarding a physician's 'previous damaging or incompetent performance' will follow the physician when he or she moves from state to state." (Appendix A, p.45). By so limiting its interpretation of Congressional purpose, the Court of Appeals ignored the harmonizing effect of other provisions of the HCQIA that clearly reflect a broader legislative intent, including provisions designed to stimulate the interstate flow of peer review information among healthcare entities, and to insure that physicians are afforded fair process not only in the report/query process, but also in post report peer review activities.

Justice Scalia noted in United Savings Ass's v.

Timber of Inwood Forest Associates, 484 U.S. 365, 371 (1988), that all of the provisions of a statute are to be read as a harmonious whole in order to determine the intent of Congress:

> Statutory construction, however, is holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme - because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law. (Citations Omitted)

The Court of Appeals' overly narrow reading of the HCQIA effectively sanctions the misuse of a facially valid litigation peer review privilege to deny a request for peer review information by a credentials committee conducting a HCQIA mandated confidential peer review. The rationale for that conclusion is that Congressional intent cannot be interpreted to impose any limitation upon a healthcare entity's refusal to supplement information

reported by it to the NPDB. Specifically the opinion states the *ratio decidendi* of the holding at p. 8 of the decision (Appendix A, p.44) as follows:

> Without deciding whether the Alabama legislature intended for the peer review privilege to be applied in this manner, we conclude that the peer review privilege as applied did not thwart Congress' intent in enacting the HCQIA and this application of the privilege is therefore not unconstitutional under the Supremacy Clause. Nothing in the HCQIA mandates that healthcare entities provide peer review information to credentialing authorities in other states in excess of the information required to be reported to the NPDB. Indeed, as stated above, Congress enacted the HCQIA "to facilitate the frank exchange of information among professionals conducting peer review inquiries" and to ensure that some minimal amount of information regarding a physician's "previous damaging or incompetent performance" will

> follow the physician when he or she moves from state to state. Bourge's invocation of the Alabama peer review privilege to refuse to provide specific requested details regarding the surrender of Liu's clinical privileges does not conflict with either of these goals of the HCQIA. As such, the Alabama statutes at issue, as applied in this case, do not violate the Supremacy Clause. (Court's Underlining)

The flaws in this rationale lie in the Court's failure to heed Judge Scalia's admonishment in United Savings Ass's v. Timber of Inwood Forest Associates, *supra.* that, "Statutory construction, however, is a holistic endeavor."

A thorough analysis of the statutory scheme embodied in the HCQIA would commence with an assessment utilizing the plain meaning of the words used by Congress in the "Findings" section of the Act, 42 U.S.C. §§11101:

(1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State. (Underlining Provided)

(2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance. (Underlining Provided)

(3) This nationwide problem can be remedied through effective professional peer review. (Underlining Provided)

(4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust laws, unreasonably discourages physicians from

participating in effective professional peer review. (Underlining Provided)

(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review. (Underlining Provided)

A fundamental cannon of statutory construction requires the use of the plain meaning of words. See Glazner v. Glazner, 330 F.2d 1298 (11th Cir. 2002). The reasoning of the Court of Appeals ignores the plain meaning of the words underlined above in the formal "Findings" of the Act itself. It requires no leap of logic under the facts of this case to determine that the inability of USC to acquire the information it needed to conduct a HCQIA mandated peer review of an applicant for privileges frustrated its ability to "improve the quality of medical care" that it was delivering to the people of California. (Finding "1") Nor does the arbitrary denial of the requested information foster the need to restrict the ability of "incompetent" physicians

to obscure a history of damaging or incompetent performance since it obstructs the flow of the precise information needed to determine professional competency through an examination of the event(s) flagged by the NPDB notice. (Finding "2") Moreover, it certainly impinges on the ability of a peer review committee to conduct an "effective peer review" by denying it the necessary information to comply with that purpose. (Findings "3," "4" and "5")[4] The Court of Appeals failed to reach a reasoned conclusion regarding Congressional intent, in part, because it failed to assess the plain meaning of the very words used by Congress to define its purpose for enacting this significant statutory scheme encouraging interstate cooperation among healthcare entities. Had the panel not intellectually excised the phrases, "and need to improve the quality of healthcare," "need to restrict the ability of

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4 The congressional purpose of protecting peer review participants from money damages is not implicated in this case for declaratory and injunctive relief. (Finding "4")

incompetent physicians," and "effective professional peer review," it would have been logically impossible for it to reach the self-contradictory conclusion that Congress intended to "facilitate the frank exchange of information among professionals conducting peer review inquiries without fear of reprisal in civil lawsuits" by requiring healthcare entities to provide only the, "minimal amount of information," limited to that which regards a physician's "previous damaging or incompetent performance."[5]

The Court of Appeals also failed to harmonize additional provisions that Congress embedded in the HCQIA which seem to undermine its overly narrow interpretation of Congressional intent. For instance, complementary provisions relax the strict confidentiality of the information generated through the

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5 To suggest that the HCQIA encourages the provision of information limited to that which relates to "damaging or incompetent performance" is a particularly egregious error where the NPDB mandatory report is especially "minimal" such as a report of resignation pending a peer review investigation which does not identify the nature or reasons for the investigation.

mandated reporting in order to facilitate communication of peer review information among healthcare entities conducting HCQIA mandated peer review activities. 42 U.S.C. § 11137 (b)(1) provides, in part, that, "Information reported under this sub-chapter is considered confidential and shall not be disclosed (other than to the physician or practitioner involved) except with respect to professional review activity[6]. . ." 42 U.S.C. § 11137 (b)(3) states Congress' intent to "restrict use of confidential NPDB information to activities in the furtherance of the quality of healthcare." Given the facts of this case, particularly the existence of a back-channel used by UAB to communicate false information to USC, perhaps a more pertinent provision of the HCQIA is 42 U.S.C. § 11111(2), the exception to immunity from civil actions afforded third parties who

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6 Professional "peer review activity" is defined at 42 U.S.C. § 11151(10)(f) as meaning, "an activity of a healthcare entity with respect to an individual physician," to determine if he/she may have clinical privileges or membership in a healthcare entity, to determine the scope of such privilege or membership, or to change or modify such privileges or membership.

report information in connection with peer review activity if those parties knowingly provide false information. A plain reading of these code sections *in para materia* with the statutory findings demonstrates that Congress intended to encourage the use of NPDB information as a "flagging" device to alert healthcare entities to conduct further investigation of the nature of the limited information disclosed by the mandated inquiry/report procedures of the HCQIA. Otherwise, it would not have authorized those entities to disclose the information received from the NPDB in connection with peer review activities in furtherance of the quality of healthcare, nor deny civil litigation immunity to third parties knowingly providing false information in connection with peer review activities. These statutory exceptions to the blanket confidentiality of information communicated through the NPDB provisions of the HCQIA bolster the proposition that Congress did not intend the Act to inhibit the free flow of peer review information among healthcare entities in different states.

Indeed, a material fact not noted by the district or appeals courts is that UAB itself, through the adoption of its Medical Staff Bylaws, recognizes that the legislative intent of the HCQIA includes the facilitation of the communication of otherwise "confidential" peer review information among healthcare entities in connection with peer review activities. Otherwise the UAB Bylaws would not require applicants for appointment and reappointment to its medical staff to authorize it to solicit from and release to third parties, "information, including otherwise privileged or confidential information, . . . bearing on the applicant's credentials," including, "other hospitals, healthcare facilities and their agents, who solicit such information, . . . for the purpose of evaluating the individual's professional qualifications pursuant to the individual's request for appointment, reappointment or clinical privileges." Article XI of the University of Alabama Health System Bylaws. (Appendix, p. 136)

Furthermore, where the administration and

enforcement of a remedial statutory scheme is delegated to an agency, that agency's interpretation of the legislation is entitled to judicial deference. If the statutory language has not "directly addressed the precise question at issue," a court does not impose its own construction on the statute contrary to an administrative interpretation based on a permissible construction of the statute. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations"). Any doubt regarding Congress' intent to use the NPDB as a "flagging" system to encourage further inquiry from knowledgeable sources dissolves in the face of the rules and regulations adopted by the Department of Health and Human Services to implement the data bank aspects of the HCQIA.[7] 45 C.F.R. § 60.13 authorizes the imposition

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5 U.S.C. § 301 grants regulatory authority to, *inter alia*., "the head of an Executive Department, . . . for the government of his department, the conduct of its employees, the distribution and

of fines for breach of the confidentiality by disclosure of information received by the Department of Health and Human Services through the NPDB.[8] That regulation recognizes however that persons and entities receive information from the NPDB either directly or from another party and therefore mandate that the recipient must use all such information solely for the purpose for which it was provided. The regulation also states that,

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performance of its business, and the custody, use, and preservation of its records, papers, and property."

8

§ 60.13 Confidentiality of National Practitioner Data Bank information.

(a) Limitations on disclosure. Information reported to the Data Bank is considered confidential and shall not be disclosed outside the Department of Health and Human Services, except as specified in §60.10, §60.11 and §60.14. Persons and entities which receive information from the Data Bank either directly or from another party must use it solely with respect to the purpose for which it was provided. Nothing in this paragraph shall prevent the disclosure of information by a party which is authorized under applicable State law to make such disclosure.

(b) Penalty for violations. Any person who violates paragraph (a) shall be subject to a civil money penalty of up to $10,000 for each violation. This penalty will be imposed pursuant to procedures at 42 CFR part 1003.

"Nothing in this paragraph shall prevent the disclosure of information by a party which is authorized under applicable State law to make such disclosure." Thus, the freedom to disclose peer review information for the purpose for which it was provided, or under applicable state law, is explicitly recognized by this regulation.

The NPDB guide book and related publications are even more explicit in the statement of the functions and purposes of that reporting system. NPDB Guidebook[9] Chapter A, Introduction, explicitly states at p. A-4 (Appendix p. 139): "The confidentiality provisions of Title IV do not prohibit an eligible entity receiving information from the NPDB to disclose the information to others who are part of the peer review process, as long as the information is used for the purpose for which it was provided." The guide book then provides examples of appropriate uses of NPDB information to

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9 The National Practitioner Data Bank Guidebook and related agency facts sheets and instructional material may be found on the agency's web site, http://www.npdb-hipdb.hrsa.gov/

include, *inter alia.*, the disclosure by a hospital of NPDB information to "hospital officials responsible for reviewing a practitioner's application for a medical staff appointment or clinical privileges." In such cases, the guide book reminds peer review officials that providers, recipients and reviewers of the information, "are subject to the confidentiality provisions of Title IV."

The NPDB also provides a "Fact Sheet on the National Practitioner Data Bank," based on NPDB Guidebook Sec. A-3; a section of the Guidebook chapter on, "Interpretation of NPDB Information." That directive is exceptionally revealing in its description of the NPDB information as merely a "flag" designed to incite further inquiry. Those unequivocal directions state:

> The NPDB is primarily an alert or flagging system intended to facilitate a comprehensive review of healthcare practitioners' professional credentials. Eligible entities should use the information contained in the NPDB in conjunction with information from

other sources when granting clinical privileges or in employment, affiliation, or licensure decisions. The information contained in the NPDB is intended to direct discrete inquiry into and scrutiny of specific areas of a practitioner's licensure, professional society memberships, medical malpractice payment history, and record of clinical privileges. NPDB information is an important supplement to a comprehensive and careful review of a practitioner's professional credentials. The NPDB is intended to augment, not replace, traditional forms of credentials review.[10] As a nationwide flagging system, it provides another resource to assist State licensing boards, hospitals, and other healthcare entities in conducting

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10 The use of this traditional form of credentials review by UAB is admitted through its adoption of bylaws which require the medical staff to authorize the receipt from, and provision to, other healthcare entities of their peer review information.

> extensive, independent investigations of the qualifications of the healthcare practitioners they seek to license or hire, or to whom they wish to grant clinical privileges.

There can be no clearer description of the proper use of information disseminated through the NPDB, and no more definitive repudiation of the Court of Appeals' opinion permitting arbitrary state action to frustrate a sister state healthcare entity's good faith attempt to conduct the "extensive, independent" investigation expected of it under the scheme enacted to protect the public by insuring the disclosure of an accurate professional history of medical staff applicants.

Petitioner respectfully urges this Court to grant the writ of certiorari to review a Court of Appeals decision holding that a healthcare entity's arbitrary refusal to provide peer review information to authorized credentials authorities in sister states does not frustrate the Congressional intent behind the enactment of the HCQIA; a statutory notification scheme enforced by an agency that expressly encourages participants to use

the NPDB report, "in conjunction with information from other sources," and to direct "discrete inquiry into and scrutiny of specific areas of a practitioner's . . . record of clinical privileges."

As to the second question presented for review, the Court of Appeals erred in ruling as a matter of law that the Petitioner had not been "blacklisted" from his chosen profession as a professor of medicine, a role in which he has performed admirably during the vast majority of his professional life.

In determining that the record was bereft of evidence that Petitioner could not obtain a professorship at a medical school hospital other than USC, the panel failed to assess the unique nature of the credentialing process for medical professorships. Unlike the acquisition of staff privileges at a county hospital for instance, a NPDB report accompanied by a letter alleging that a physician breached the standard of care, does virtually foreclose the possibility of obtaining privileges at a university medical school hospital. This reality is demonstrated in this record though the

disparity in the credentialing processes of the two hospitals operated by USC. Appellant was able to procure credentials as a practicing cardiologist at a LAC USC Medical Center, a county hospital staffed by USC physicians, but was unable to obtain privileges at USC University Hospital, a condition of appointment to a medical professorship (Liu Deposition, p. 178, l. 1-16)(Appendix E, p 133). Moreover, even in connection with other privileges which the petitioner obtained to practice cardiology in several hospitals, each peer review process leading to those privileges were more onerous than normal because of the combination of the NPDB report and the Bourge letter, and each occasion presented great professional risk to Petitioner by reason of the potential for another adverse NPDB report should any hospital deny his application on the basis of the incomplete record from UAB (Liu Deposition p. 178, l. 17 - 180, l. 5)(Appendix H, p. 144).

While the Court of Appeals fails to recognize the inherent stigmatizing effect of a NPDB report, the Congress was clearly cognizant of that phenomena. Explaining the purpose behind the mandatory querying

obligation imposed by the HCQIA on hospitals considering applications for medical staff privileges mandated by 42 U.S.C. § 11135, the legislative history recites the following considerations:

> The committee believes this [mandatory querying] to be appropriate given the central role that hospitals play in the nation's healthcare system. It is in hospitals that the most serious medical cases are cared for and the most sophisticated and hazardous treatments are provided. Most peer review occurs in the hospital setting. For most physicians and licensed healthcare practitioners, perhaps the most severe disciplinary action next to the loss of their license is the loss of clinical privileges at a hospital. Accordingly, it is essential that hospitals be as well informed about the competency and professional conduct of their medical staff as possible. (Underlining Provided)

This committee report explicitly recognizes that mandatory reporting and querying reflects

Congressional intent to protect the reputations of physicians who are the subject of NPDB reports. Recognizing the severity of the stigmatizing effect of reportable data bank reports, the Congressional Committee concludes, "Accordingly, it is essential that hospitals be well informed about the competency and professional conduct of their medical staff as possible."

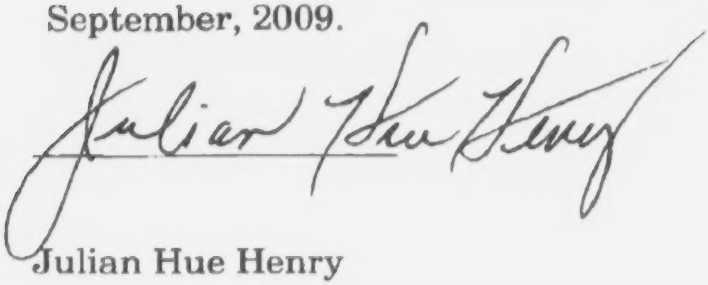
Additionally, several provisions of the HCQIA bolster a statutory interpretation expressly recognizing the seriousness of the consequences of the type of blacklisting that the Court of Appeals seems to condone in this case. For instance, HCQIA damage immunities otherwise granted to third parties providing peer review information for use in peer review activities are denied if those parties knowingly provide false information, 42 U.S.C. § 11111(2). Similarly, Congress exempted peer review information from strict confidentiality of peer review records such as USC sought from UAB to further encourage the free exchange of peer review information among interstate healthcare entities, 42 U.S.C. § 11137 (b)(1). Clearly, the HCQIA, while not creating a cause of action for physicians injured by violations of its

mandates, recognizes that a physician subjected to the knowing dissemination of false peer review information by someone purporting to act with HCQIA immunities, sustains cognizable injury which may be compensated by a jury if the cause of action is sustainable under other federal or state statutory or constitutional remedies.

CONCLUSION

For the above and foregoing reasons, the Petitioner respectfully requests the issuance of the writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to authorize a review by this Court of the serious issues of statutory construction raised in this petition, and the implications of the lower court decisions which undermine HCQIA's fundamental policy of encouraging cooperation among interstate healthcare agencies to insure the availability of sufficient information to enable participants in peer review activities to be "well informed" when making decisions which indisputably impact the professional careers of those physicians under review.

Respectfully Submitted this 17th day of September, 2009.



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Appendix A

United States Court of Appeals

Eleventh Circuit

56 Forsyth Street,

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Georgia 30303

Thomas K. Kahn For rules and forms visit

Clerk www.ca11.uscourts.gov

May 19, 2009

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 19, 2009

No. 09-1001

Thomas K. Kahn CLERK

D.C. Docket No 07-00381-CV-AR-S

MING WEI LIU,

Plaintiff-Appellant,

versus

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, ROBERT C. BOURGE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(May 19, 2009)
Before CARNES, WILSON and KRAVITCH, Circuit Judges.
PER CURIAM:

Appellant Dr. Ming Wei Liu ("Liu") challenges the district court's grant of summary judgment in this case.

I.

Liu is a cardiologist who, between 1991 and 2001, was a tenured AssociateProfessor of Medicine at the University of Alabama Birmingham ("UAB"). In 2001, for reasons not relevant to this appeal, the director of the Division of Cardiovascular Research at UAB Dr. Robert Bourge ("Bourge") summarily suspended Liu's clinical privileges and instituted a "peer review" investigation of Liu's clinical privileges. Upon the advice of counsel, Liu submitted his resignation before the investigation was completed. As required by the Healthcare Quality Improvement Act of 1986

("HCQIA"), 42 U.S.C. § 11111, et seq., UAB reported Liu's resignation during the pendency of an investigation to the National Practitioner Data Bank ("NPDB").

After resigning from his position at UAB, Liu applied for a professorship at the University of Southern California Hospital ("USC"). As a part of his application for staff privileges, USC asked Liu to request that UAB forward certain peer review information to USC, so that it could evaluate the report on the NPDB. Instead of sending the requested peer review information, Bourge sent a "recommendation letter" to USC stating that Liu was placed on probation and was being investigated because his "performed procedures, planned procedures, certain aspects of medical care, and his hospital chart documentation were not within the standard of care at our institution." Upon receiving this letter, USC again requested additional peer review information regarding the cases Bourge asserted were not within UAB's "standard of care." UAB invoked Alabama state medical peer review privilege, Ala. Code §§ 6-5-333 and 22-21-8 ("peer review privilege"), and refused to provide the peer review information concerning Liu to USC. Because it did not receive the requested peer review information,

the USC credentialing committee denied Liu's application for staff privileges as incomplete. After being denied staff privileges at USC, Liu was eventually granted clinical privileges at several hospitals in the Los Angeles, California area, where he is currently practicing medicine.

Liu commenced this case against UAB and Bourge seeking, inter alia, a declaratory judgment and injunctive relief to require UAB to provide the peer review information concerning Liu to the credentialing committee of USC. In addition to several state law claims, Liu asserted two claims pursuant to 42 U.S.C.§ 1983, alleging that UAB's invocation of the Alabama peer review privilege to refuse to provide the peer review information to USC (1) violated the Supremacy Clause of the United States Constitution by obstructing the "essential purpose" of the HCQIA and (2) violated Liu's Fourteenth Amendment right to substantive and procedural due process and to equal protection by interfering with his right to pursue his chosen profession. Upon cross-motions for summary judgment, the district court found, inter alia, that (1) UAB, as an instrumentality of the state of Alabama, is immune from suit under the Eleventh Amendment; (2) Bourge's

refusal to provide the peer review information requested by USC did not violate the "essential purpose" of the HCQIA; and (3) because Liu is currently practicing as a cardiologist and has not shown that UAB/Bourge's conduct has prevented him from employment as a professor of medicine with all employers, Liu has no valid due process claim. Accordingly, the district court dismissed all claims asserted against UAB and dismissed the federal claims asserted against Bourge. Then, because jurisdiction was premised upon federal question[1] and all of the federal claims had been dismissed, the district court declined to exercise jurisdiction over the state law claims and dismissed them without prejudice.

Liu appeals, challenging the dismissal of his federal claims against Bourge.[2]

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In his complaint, Liu also claimed federal jurisdiction on the basis of diversity of citizenship. The district court, however, found that Liu had not established the requisite amount in controversy and that federal jurisdiction was only proper because Liu asserted federal claims. Liu does not dispute this finding on appeal.

2

Liu does not appeal the district court's determination that UAB is immune from suit under the Eleventh Amendment.

II..

"We review the district court's grant of summary judgment de novo applying the same legal standards that bound the district court, and viewing all facts and reasonable inferences in the light most favorable to the nonmoving party." Cruz v. Publix Super Markets, Inc., 428 F.3d 1379, 1382 (1 1th Cir. 2005) (citation and quotation omitted). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56©.

III.

Liu appeals the grant of summary judgment, asserting that the district court erred (1) by finding that Bourge's refusal to provide the requested peer review information did not violate the Supremacy Clause as inconsistent with the HCQIA; and (2) by finding that Liu had not established that his constitutionally protected "right to pursue his chosen profession" was

violated.[3]

Regarding Liu's first assignment of error, Liu argues that Bourge's interpretation of the Alabama peer review privilege "frustrates" Congress' intent in enacting the HCQIA and that therefore the privilege as applied is unconstitutional as violative of the Supremacy Clause. See Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 604-05 (1991). We disagree.

Congressional intent is the "ultimate touchstone"

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Liu also argues that the district court erred in its "threshold conclusion" that the Alabama peer review privilege could be invoked to refuse to provide peer review information properly requested by a hospital in another state. The district court, however, did not actually reach this conclusion; rather, it considered whether the peer review privilege, as it was asserted by Bourge, violated Liu's constitutional rights. After finding that Bourge's invocation of the privilege to deny USC's request for peer review information did not violate any of Liu's federally protected rights, the district court declined to exercise its supplemental jurisdiction over the pending state law claims and therefore had no need to determine whether the state law privilege was intended to be asserted in such a manner. See Pintando v. Miami-Dade Housing Agency, 501 F.3d 1241, 1242 -1243 (11th Cir. 2007) (noting that a district court "may decline to exercise supplemental jurisdiction over a claim if . . . the district court has dismissed all claims over which it has original jurisdiction"). Our review therefore is limited to the district court's findings regarding the sufficiency of Liu's constitutional claims.

in a Supremacy Clause case, Medtronic. Inc. v. Lohr, 518 U.S. 470, 485 (1996), and this intent "governs our determination of whether federal law preempts state law." Boyes v. Shell Oil Prods. Co., 199 F.3d 1260, 1267 (1 1th Cir. 2000); see This That and Other Gift and Tobacco. Inc. v. Cobb County . Ga., 285 F.3d 1319, 1322 (1 1th Cir. 2002). Only if the application of a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" will it be deemed a violation of the Supremacy Clause and therefore preempted by the federal law. See Mortier, 501 U.S. at 604-05 (1991).

Congress enacted the HCQIA to address the rising problem of medical malpractice and the ability of incompetent doctors to move between states without having their prior practice records follow them[4] and to

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4 To that end, it created the NPDB, a national registry which requires healthcare entities, inter alia, to report the following information upon accepting a physician's surrender of clinical privileges while under an investigation: "the name of the physician involved; a description of the acts or omissions or other reasons for the action or, if known, for the surrender; and such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate." 42 U.S.C. § 11133(a)(3). Liu does not allege that UAB's report to the NPDB failed to satisfy HCQIA' s statutory disclosure requirements.

create a presumptive immunity from monetary damages awarded against participants in the peer review process. 42 U.S.C. §§ 11101 - 11111. The Alabama statutes at issue, Ala. Code ,§§, 22-21-8 and 6-5-333(d), supplement the HCQIA by providing participants in the peer review process with an explicit privilege from discovery in the civil litigation context.[5] We conclude that the intent of both the federal and state statutes, therefore, is "to facilitate the frank exchange of information among professionals conducting peer review inquiries without the fear of reprisals in civil lawsuits." Bryan v. James E. Holmes Reg'l Med. Ctr. 33 F.3d 1318, 1322 (1 1th Cir. 1994) (interpreting the HCQIA); accord Ex parte Krothapalli, 762 So. 2d 836, 838 (Ala. 2000) ("In order to make meaningful peer review possible, the [Alabama state] legislature provided a guarantee of

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'The plain language of Alabama's two statutes, §§ 6-5-333 and 22-21-8 . . . declares as privileged 'all information, interviews, reports, statements, or memoranda furnished to any committee as defined in this section' . . . and provides that 'no person involved in preparation, evaluation or review of accreditation, quality assurance or similar materials shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented." Ex parte Burch, 730 So 2d 143, 149 (Ala. 1999) (finding testimony of a peer review committee chairman privileged).

confidentiality for the peer review process . . . .") (quoting Cruger v. Love, 599 So. 2d 11 1, 113-14 (Fla. 1992)); Marshall v. Planz, 145 F. Supp. 2d 1258, 1265 (M.D. Ala. 2001); McGee v. Bruce Hosp. Sys., 439 S.E.2d 257, 259-60 (S.C. 1993) ("The underlying purpose behind the confidentiality statute is not to facilitate the prosecution of civil actions, but to promote complete candor and open discussions among participants in the peer review process.").

In this case, however, Bourge interpreted the state law privilege as extending beyond the litigation context and requiring UAB to not disclose to USC's credentialing committee the information the UAB peer review committee had gathered during its investigation of Liu. Without deciding whether the Alabama legislature intended for the peer review privilege to be applied in this manner, we conclude that the peer review privilege as applied did not thwart Congress' intent in enacting the HCQIA and this application of the privilege is therefore not unconstitutional under the Supremacy Clause. Nothing in the HCQIA mandates that healthcare entities provide peer review information to credentialing authorities in other states in excess of the information required to be reported to the NPDB.

Indeed, as stated above, Congress enacted the HCQIA "to facilitate the frank exchange of information among professionals conducting peer review inquiries" and to ensure that some minimal amount of information regarding a physician's "previous damaging or incompetent performance" will follow the physician when he or she moves from state to state. Bourge's invocation of the Alabama peer review privilege to refuse to provide specific requested details regarding the surrender of Liu's clinical privileges does not conflict with either of these goals of the HCQIA. As such, the Alabama statutes at issue, as applied in this case, do not violate the Supremacy Clause.[6]

Liu also argues on appeal that Bourge's refusal to provide the peer review material and sending of the "recommendation" letter to USC effectively blacklisted him and prevented him from pursuing his chosen profession as a professor of medicine.[7] Accordingly,

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This is not to say Liu is without legal recourse if Bourge in fact wrongfully invoked the privilege to deny Liu's request for his peer review information; we only conclude that Liu has identified no Supremacy Clause violation.

7

The parties dispute whether Liu's "chosen profession" is a cardiologist or a professor of medicine. We reach the same

because the right to follow a profession free from unreasonable government interference is a protected property right, Liu asserts that he has presented sufficient evidence supporting his substantive due process claim. Again, we disagree.

The Supreme Court has recognized that the liberty component of the Fourteenth Amendment's Due Process Clause includes the right to pursue a profession. See Conn v. Gabbert, 526 U.S. 286, 291-92 (1999) (stating that there is "some generalized due process right to choose one's field of private employment"). In recognizing a violation of this right, however, the Court has noted that its cases "all deal with a complete prohibition of the right to engage in a calling, and not [a] sort of brief interruption." Id. at 292 (emphasis added). In Board of Regents v. Roth, 408 U.S. 564, 573 (1972), for example, the Supreme Court found that an employee's due process rights are triggered where the state employer imposes "a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities." (Emphasis added). In Clemons v. Dougherty County, Georgia, 684 F.2d 1365,

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conclusion regardless; therefore, we need not decide this issue.

1371 (11th Cir. 1982), this court reiterated the standard for proving a deprivation of the liberty interest, stating that a plaintiff must establish that the state employer made "stigmatizing charges which foreclose his freedom to take advantage of other employment opportunities." See also Sullivan v. School Bd. of Pinellas County, 773 F.2d 1 182, 1 187 (11th Cir.1985) (finding that published comments regarding public employee's non-renewal did not implicate a liberty interest because they did not "foreclose [her] freedom to take advantage of other employment opportunities"); Pirolo v. City of Clearwater, 71 1 F.2d 1006, 1011 (1 1th Cir. 1983) (dismissing airport operator's substantive due process claim where ordinances did not prevent him from continuing his profession "either at another location or under the restrictions imposed"). As such, to survive summary judgment, a claimant must present evidence suggesting that a governmental act effectively banned him or her from a profession. See Clemons, 684 F.2d at 1374; see also Bordelon v. Chi. Sch. Reform Bd. of Trs., 233 F.3d 524, 531 (7th Cir. 2000) ("It is not enough that the employer's stigmatizing conduct has some adverse effect on the employee's job prospects; instead, the employee must show that the stigmatizing actions make it virtually impossible for the employee to find new

employment in his chosen field."); Engquist v. Oregon Dept. of Agriculture, 478 F.3d 985, 996-98 (9th Cir. 2007) (limiting a substantive due process occupational liberty claim "to extreme cases, such as a government blacklist, which when circulated or otherwise publicized to prospective employers effectively excludes the blacklisted individual from his occupation, much as if the government had yanked the license of an individual in an occupation that requires licensure"); see also Olivieri v. Rodriguez, 122 F.3d 406, 408 (7th Cir. 1997) (same).

In this case, it is undisputed that Liu has received staff privileges and is currently practicing medicine with at least one hospital in California, despite the allegedly stigmatizing conduct of his former public employer. Furthermore, although he was denied a professorship at USC, Liu has presented no evidence that he would be unable to secure a similar position with any other employer. As such, Liu has simply failed to show that a state agent's conduct entirely foreclosed his freedom to pursue employment in his chosen field as either a cardiologist or a professor of medicine. Accordingly, we conclude that the district court properly granted summary judgment on Liu's substantive due

process claim.

IV.

For the reasons stated herein, we AFFIRM the judgment of the district court.

Appendix B

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street,
N.W. Atlanta, Georgia 30303

Thomas K. Kahn For rules and forms visit
Clerk www.ca11.uscourts.gov

June 23, 2009

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
June 23 2009
No. 09-1001
THOMAS K. KAHN CLERK

D.C. Docket No 07-00381-CV-AR-S

MING WEI LIU,

Plaintiff-Appellant,

versus

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, ROBERT C. BOURGE,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

Before: Carnes, Wilson and Kravitch, Circuit Judges.
Per Curiam:

The petition for rehearing filed by the Appellant is DENIED.

Entered for the Court:

S/ Phyllis Kravitch
United States Circuit Judge

Appendix C

FILED
2006 Dec-15 PM 04:19
U.S. DISTRICT COURT
N.D. OF ALABAMA

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MING WEI LIU,	}	
Plaintiff,	}	CIVIL ACTION
v.	}	NO.
BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, et al.,	}	07-AR-0381-S
Defendants.	}	

MEMORANDUM OPINION

Before the court are the motions of defendants, Dr. Robert C. Bourge ("Bourge") and the Board of Trustees of the University of Alabama ("Board"), for summary judgment seeking dismissal of the action of plaintiff, Dr. Ming Wei Liu ("Liu"). The Board is the governing authority for the University of Alabama at Birmingham ("UAB"). Also before the court is Liu's motion for partial summary judgment. In abbreviated form, Liu asserts that defendants deprived him of his substantive and

procedural due process rights by invoking the Alabama peer review[1] privilege. Liu argues that, even if such privilege exists, it does not apply in federal court, and that for this reason UAB should be ordered to disseminate peer review materials to Liu's prospective employers. Without distinguishing between defendants, Liu makes several claims, including federal claims pursuant to 42 U.S.C. § § 1983 and 1988, and state law claims under Alabama and California law. Defendants interpose several affirmative defenses, including the Eleventh Amendment and the statute of limitations. For the reasons that follow, defendants' motions will be granted and Liu's motion will be denied.

I. Summary Judgment Facts[2]

1

"Peer review [is] the process by which physicians and hospitals evaluate and discipline staff doctors..." *Bryan v. James E. Holmes Regional Med. Ctr.*, *33* F. 3d 1318, 1321 (11th Cir. 1994).

2

Summary judgment is appropriate where the moving party demonstrates that there is no genuine issue of law. Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In assessing whether the movant has met his burden, the court must view the evidence, and all inferences drawn therefrom, in the light most favorable to the non-movant. *Hairston v. Gainesvill Sun Pub. Co.*, 9 F. 3d 913, 918 (11th Cir. 1993). At this juncture, the court does not "weigh the evidence and determine

Liu is a physician who practices general cardiology and interventional in cardiology[3] the Los Angeles, California area. From 1991 until his resignation on November 21, 2001, Liu was employed by UAB as a tenured associate professor/academic physician in the department of medicine. The undisputed material facts and relevant background information that led to Liu's resignation are somewhat lengthy, but need to be stated.[4]

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the truth of the matter," but solely "determines] whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (citations omitted). This determination involves applying substantive law to the substantive facts that have been developed. A dispute about a material fact is genuine if a reasonable jury could return a verdict for the nonmoving party, based on the applicable law in relation to the evidence developed. *See id.* at 248; *Harfield v. Brierton*, 883 F. 2d 923, 933 (11th Cir. 1989).

3

Interventional cardiology is a specialty of cardiology. Webster's Medical Desk Dictionary 100 (1986) (defining "cardiology" as "the study of te heart and its action and diseases"). Interventional cardiology "refers to diagnostics and non-surgical treatments of the heart. Cardiac interventions are used to diagnosis [sic] and treat coronary artery disease, valvular heart disease, and congenital heart disease. Http://www.stanfordhospital.com/clinicsmedservices/coe/heart/heartcenterservices/interventionalcardiology/default.

4

If there are facts contained in this section that are disputed, the court will expressly note them as such.

In 1991, Liu was recruited to the UAB School of Medicine by Dr.Gary Roubin ("Roubin"), the director of interventional cardiology. Liu became an assistant professor/academic physician in the interventional cardiology program, a subdivision of UAB's cardiology division.[5] At the time Liu assumed this position, the director of UAB's cardiology division was Dr. Pohost. In 1996, Bourge took over Dr. Pohost's position. Sometime thereafter, Roubin left UAB. From this time forward, until the year 2000, Dr. Larry Dean ("Dean") served, in some capacity,[6] as the acting director of the

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Dr. Pohost was the chief of the cardiology division until Dr. Bourge replaced him in 1996. Bourge remains the head of cardiology at UAB. http://cardiology.dom.uab.edu/index.html. The head of the UAB department of medicine is overall responsible for the cardiology division.

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The record creates some confusion as to whether Dr. Larry Dean was the acting head of the interventional cardiology program, the catheterization laboratory ("cath lab"), or both. Likewise, the record is unclear as to whether the terms "director of the interventional cardiology program" and "director of the cath lab" are synonymous. To illustrate, the record reflects Dean took over for Roubin in 1996 and served as the "acting" director of the interventional cardiology program until 2000. Yet, Liu testified that from 1996 to 2000, Dean was "acting director of the cath lab and was mostly concerned with administration, while most of the clinical work fell to Liu." In any event, Dean's full responsibilities are not of relevance. What is relevant is that the interventional cardiology program to some degree, has control over, and

interventional cardiology program. From 1996 until 2000, in addition to the turnover in directors, several interventional cardiologists departed. As a result, Liu's workload increased significantly. In comparison with his peers, Liu handled a significant plurality of cases in the interventional cardiology department, both during and after this decrease in the number of physicians.

In early 2000, Dean left UAB. Sometime prior to July, 2000, Bourge hired Dr. Greg Chapman ("Chapman") as director of the interventional cardiology program, thus filling the office vacated by Roubin. Prior to his promotion, Chapman served as an assistant professor at UAB. At all relevant times, Bourge's superiors included Dr. William J. Koopman ("Koopman"), head of UAB's Department of Medicine, and Dr. Scott Buchalter ("Buchalter"), UAB's Chief of Staff. Koopman served from 1995 until 2005 and approved Bourge's selection of Chapman.

A) Professional disagreements between Liu and UAB

Liu did not approve of Chapman as the new director

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interaction with. the cath lab.

of the interventional cardiology program and made no effort to disguise his displeasure with the appointment. Liu testified that Bourge told him that the program director's replacement would be at least as qualified as, if not more qualified, than Dean. In addition, Liu was under the impression that Dean's replacement would likely be hired from outside of UAB. After Chapman's hiring, Liu bluntly confronted his new superior.[7] Liu told Chapman that he lacked the professional acumen Liu had the right to expect. According to Liu, Chapman's academic profile and interest in clinical research and cath lab work, particularly as compared with Roubin and Dean, failed to meet reasonable expectations. Liu claims that Bourge failed to keep his word concerning Chapman's hiring. Liu met with Chapman a second time, with little or no resolution concerning their professional differences. At this second meeting, Liu says Chapman said that Liu was "just angry." Liu agrees that he was probably angry, but says

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The time line of events between 2000 and November 21, 2001, is not perfectly clear. The record fails to reflect to the exact dates of Liu's conversations with Chapman and whether these conversations occurred before or after Liu's June 10, 2000, letter. It is of little import, however, because it is merely background information.

he was merely attempting to relay his concerns about maintaining UAB's highly renowned interventional cardiology program. This and other professional differences, between Liu and both Chapman and Bourge, were the catalyst for Liu's search for employment outside UAB.

On June 10, 2000, Liu wrote a letter to Bourge informing him that his departure from UAB was "imminent."[8] Liu received offers from other employers. Liu says that a conversation between Koopman and Liu's prospective employer motivated UAB to offer Liu a substantial raise. He accepted and decided to stay at UAB.

1. January 2001 - July 17, 2001

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8 Liu's letter also stated:

> My only regret is that with all my hard work during the past 8 years and the strong foundation that [Roubin], myself and others have build [sic] for the Interventional Cardiology [sic], we have now reached a critical turning point with many uncertainties lying ahead. It will take strong leadership with clear vision to guide the Interventional Division through this treacherous time. I have full confidence in you that you will be successful in rebuilding the Interventional Cardiology.

Prior to 2001, the record reflects that Liu received no discipline of any kind from UAB. In 2001, however, Liu's relationship with UAB deteriorated. Approximately mid-June 2001, there were at least three major conflicts between Liu, Chapman, and Bourge.[9] First, on July 9, 2001, Chapman intervened

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These events are largely memorialized in a letter of reprimand from Bourge to Liu dated July 17, 2001. Liu's response letter is dated July 24, 2001.

[10] A "percutaneous transluminal coronary angioplasty" or "PCTA" is defined as "a percutaneous transluminal angoiplasty (hereinafter "PTA") of a coronary artery." Webster's at 528. For a full definition, *see id.*; *see also* Webster's at 382.

[11] A "lesion" is "an abnormal change in structure of an organ or part due to injury or disease." Webster's at 382.

[12] The term "standard of care" is a medical term of art which, unsurprisingly, is difficult to define. It likewise appears to be a moving target. At a minimum, according to Bourge, the term in this context includes UAB's "Standard of Care" Manual, the UAB bylaws, ACC/AHA guidelines, and the minutes and oral instruction of faculty meetings. According to Bourge, UAB's standard of care has both administrative and operational components to which physicians must adhere. The court finds that the interplay of the standards of care is of little consequence to the court's analysis going forward.

[13] An angiogram is "a roentgenogram (a photograph made with an X-ray) made by an angiography." Webster's at 33, 624 (1986). An angiography is "the roentgenographic visualization of the blood vessels after injection of a radioopaque substance." *Id.*

and stopped a PCTA/PCI[10] procedure Liu was about to conduct on a patient with a lesion in the left coronary artery (hereinafter "PCTA/PCI bypass issue").[11] The issue concerned the appropriate standard of care, particularly under the then current guidelines issued by the American College of Cardiology and the American Heart Association (hereinafter collectively "ACC/AHA").[12] According to Liu, although typically the proper action was a referral for bypass surgery, in certain cases, an angiogram[13] was the proper diagnostic procedure.[14] Chapman disagreed, intervened and

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at 34. "Radioopaque" is defined as "being opaque to radiation and especially X rays." *Id.* at 601. "Opaque" in this context means "not percious to radiant energy." *Id.* At 493.

14 Liu testified:

> There is an issue among the [sic] all angiographers, people who does the angiogram. The reading and assessment of the severity of a blockage varies from one end to the other. And that is the way it is. So people disagree with what other people want to do. It's a very common thing. It's not uncommon. One angiographer think [sic] the lesion is significant. The other think no [sic].

And its been studied. They sent out a number of films to have a number of well-known interventionalists, angiographers review them. And the assessment of those same lesions among all these well-known, well-respected angiographers ranging from one way to the other [sic] because your eyeball assessment is different. The way you look, compare is different.

Liu Deposition, at 117-118.

stopped the procedure. Chapman warned Liu that if he continued to do the procedure, Chapman would remove his cath lab privileges. In a July 24, 2001, response letter, Liu memorialized his belief concerning the PCTA/PCI issue. He averred that although ACC/AHA periodically published procedural guidelines for PCTA/PCI issues, "interventional cardiology is a very rapid evolving field and the guidelines generally lag[ ] behind the new concepts and practices. PCTA of left main artery is a common practice . . . [and] forty cases of left main PCTA have already been performed at UAB in the past two years." July 24, 2001 letter from Liu to Bourge.

Second, in early 2000, UAB's policy changed concerning physician visitation of patients. The new policy required UAB attending physicians, and not merely their physician extenders,[15] to visit each patient on their day of discharge from UAB. Liu says that Chapman came to Liu and ordered him to visit each of his patients in accordance with this policy.[16] Bourge

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15 The label "physician extenders" generally refer to a category of nonphysician hospital staff, including physician assistants, nurse practitioners, and clinical nurse specialists.

testified that several anonymous UAB staff members informed him that Liu's "patients . . . may go for days without seeing Liu." Upon learning of this, Bourge says that he looked into Liu's patient's files. He discovered notes in Liu's files which indicated Liu visited patients on certain days, when in fact, Bourge believed Liu had not. Thus, he drew the inference that Liu had falsified the notes. Liu does not expressly deny these assertions.

Third, Liu was accused of performing "elective procedures" at 11 P.M., in violation of UAB's "emergencies only policy" for procedures after 7 P.M. Liu insists that the only procedures he did after 7 P.M. were, in fact, emergencies, and that it was actually the late night hospital staff, i.e., nurses, who usurped his authority and determined, on their own, that a particular case was or was not an emergency.[17] Liu

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Concerning his relationship with Chapman and the post 7 P.M. procedures, Liu testified:

> If [Bourge] put in somebody good, I will try to work with him. Larry Dean was fine. At least he had the leadership. Chapman does not have leadership. He want [sic] to work from 8 to 5. He want [sic] to go home at 5. He want [sic] to have dinner with the family. Very important to him. To me as an interventional cardiologist, you can't do that. Sorry. . . . According to my understanding [of the standards for an interventional cardiologist director at UAB, Chapman's] performance had not been up to that

argued that only the physician's judgment mattered and urged Bourge to reconsider this rule.

2) July 18, 2001 - October 26, 2001

Discussions began between Liu and his former colleague Pohost about the possibility of Liu's leaving UAB for the University of Southern California Hospital ("USC"). Sometime in August, Liu went to USC for an interview. According to Liu, following the interview, Pohost spoke with Bourge about Liu. Liu says Bourge told Pohost he was going to force Liu to resign. There is no confirming testimony from Pohost. Around this time, another patient incident added to UAB's growing concerns. Liu performed a PTCA/PTI on an obese patient, which eventually led to the patient's emergency return to UAB for a hematoma[18] of the groin (hereinafter "PCTA/PTI hematoma issue").[19] The parties

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standard.

18 A "hematoma" is "a tumor or swelling containing blood." Webster's at 286.

19 The groin was the puncture sight for the PCTA/PCI

dispute which procedure or lack of procedure was the cause, in fact, of the hematoma complication.

Liu contends that the day after he performed the PCTA/PCI, another interventional attending physician visited his PCTA/PCI patient and found a pseudo-aneurysm ("a vascular abnormality that resembles an aneurysm in roentgenography") in the groin, whereupon, a vascular surgeon was consulted. See Webster's at 584-85. Liu claims that the vascular surgeon found that the pseudoaneurysm was not severe enough to require an immediate operation. According to Liu, this took place on a Saturday, and the vascular surgeon told the patient to return Monday to ensure no complications. On Monday, the patient returned, and the vascular surgeon sent the patient home without operating, because the aneurysm was not severe. According to Liu, culpability lay squarely with the vascular surgeon for discharging the patient. Bourge testified he was ultimately more concerned that Liu undertook an unnecessary PCTA/PCI than with the discharge of the patient by the surgeon.

On or about October 9, 2001, Bourge met with

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operation Liu performed.

Liu. The specifics of the discussion are not altogether clear, nor are they undisputed. What is clear is that the parties discussed the PCTA/PCI hematoma issue. Liu says that Bourge told him to resign to avoid Bourge's submitting of the PCTA/PCI hematoma issue to a peer review committee. Importantly, Bourge and Koopman testified that the PCTA/PCI bypass and hematoma issues were not the only incidents with respect to Liu's practice in the months leading up to the October 9, 2001, notice of referral to peer review. However, they refused to testify further about other incidents, claiming Alabama's peer review privilege.

On October 24, 2001, Liu wrote Koopman a letter memorializing the October 9, 2001, meeting with Bourge. The letter also provided Liu's stance on certain patient care issues, including the PCTA/PCI hematoma issue. Liu stated, "I stand by my decision to perform what I consider a necessary PTCA to [sic] the best interest [sic] of my patient and welcome the opportunity to explain and defend my decision to the Quality Assurance Committee."[20]

20

The record is unclear as to the sequence of events and the actual names of each peer review committee. Bourge stated there was a Quality Assurance Committee, where initial reportable

In a letter dated October 26, 2001, Koopman summarily suspended Liu from "UAB Health System medical staff membership and clinical privileges based on [the Division of Cardiovascular Disease's] concerns that [Liu's] continued practice may result in an imminent danger to the health of the patients under [Liu's] care." After consulting with university attorneys, the bylaws,[21] and the head of the

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incidents would be taken. It is uncertain if Bourge spoke with the Quality Assurance Committee after the October 9, 2001 meeting, or whether the first "committee" to review Liu's case was the "Ad Hoc Committee." *See infra* note 22 and accompanying text.

21

Section 13.3 of the UAB Bylaws states in pertinent part:
13.3 SUMMARY SUSPENSION.
The Chief of Service concerned, or the Chief of Staff, shall have the authority to summarily suspend a Practitioner's medical staff membership and clinical privileges where failure to do so may result in an imminent danger to the health of any individual. Suspension shall become effective immediately, and the Practitioner's patients shall be assigned to another Practitioner by the Chief of Service or Chiefs of Staff. The Credentials Committee will review the summary suspension as soon as possible, but in any event, no later than 14 days after the summary suspension becomes effective. The committee may modify, continue or terminate the terms of the Summary Suspension. If the committee continues the Summary Suspension, the practitioner shall have the right to review, as set forth in Article XIV. . . .

The process does not end with the Credentials Committee. The UAB bylaws also provided for an appeal to the Medical Staff Committee. Article XIV provides:

"Credentials Committee," Koopman testified he then handpicked an internal "Ad Hoc Committee" of Liu's peers from varying specialities.[22] Liu alleges, *inter alia*,

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XIV. HEARING AND APPELLATE REVIEW
14.1 NOTICE OF ADVERSE ACTION
The Credentials Committee will forward all recommendations to the Medical Staff Committee. The Medical Staff Committee will furnish a written notice to the Practitioner advising the practitioner of the Adverse Action that is recommended; the reasons for the recommendation; that the Practitioner has thirty days after the date of the notice within which to submit a written request for a hearing; and a summary of the Practitioner's rights in the hearing, including notification that the hearing panel will not be composed of any individual in direct economic competition with practitioner; the **right to representation by an attorney or other person of the practitioner's choice; the right to have a record made of the proceedings; the right to call, examine and cross-examine witnesses; the right to present evidence determined to be relevant by the hearing panel; the right to submit a written statement at the close of the hearing**; and upon completion of the hearing; the right to receive the written recommendation of the panel including a statement of the basis for the recommendation.
(emphasis supplied).

22

The Ad Hoc Committee consisted of Dr. McGiffin, Dr. Young, Dr. Plumb, and Dr. Whitten. This committee gave a report to the ultimate peer review committee, the standing "Credentials Committee." Koopman received a copy of its report. According to Koopman, the Ad Hoc Committee was charged with two issues. First, "whether cardiac catheterization and interventional procedures such as PTCA as performed by Dr. Liu at UAB had been performed in the absence of clear indications and thus far outside the standard of care in the cardiology community or presented unwarranted risk to the patient." Second, "whether Dr. Liu adequately addressed and remedied these performance issues

that this committee was hand picked by Bourge, that the committee members were influenced by Bourge, and that the Ad Hoc Committee was entirely unfair.

3) October 27, 2001 - November 21, 2001

In a letter dated October 29, 2001, Koopman requested Liu to provide the name of a physician, external to UAB, to participate in the peer review process. Liu replied with Dr. Entman from Baylor University, a physician he did not know personally. Entman and at least one other physician from outside UAB were retained for peer review. Koopman testified UAB provided a package of selected "problem" cases for these external reviewers and for the Credentials Committee. On or about October 31, 2001, Liu retained attorneys Edward Hardin and Bernard Nomberg. The record reflects that Nomberg primarily handled the matter.

On November 8, 2001, in a letter from Buchalter to Liu, Buchalter informed Liu that the Credentials Committee voted on November 7, 2001, to continue the summary suspension of October 26, 2001, pending the

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over a period of time."

report of the Ad Hoc Committee. On November 16, 2001, the Ad Hoc Committee made its report to the Credentials Committee. In a letter dated November 21, 2001, the Credentials Committee "voted unanimously to recommend the revocation of [Liu's] clinical privileges and medical staff membership and to continue the summary suspension imposed on October 26, 2001 . . . ."

On the same day, Liu resigned. Liu testified that he discussed the Ad Hoc Committee's action with Nomberg. According to Liu, Nomberg told him if "we resign now, it would be okay." Liu Deposition, at 134. Notably, Liu alleges in paragraph eleven of his complaint that "on advice of counsel and in the good faith belief that he possessed the credentials and professional reputation to obtain comparable employment elsewhere, he submitted his resignation on November 21, 2001." Liu thus did not exercise the right contemplated by the UAB bylaws to participate in the peer review of his summary suspension, nor did he utilize the UAB appeal process. Liu testified that he knew that the report would be submitted to the National Practitioner Data Bank ("NPDB"). UAB submitted the adverse report to the NPDB, as it was required to do. Although the record is

not entirely clear, it appears that the NPDB report states "resignation during the pendency of an investigation."

4) November 22, 2001 - February 28, 2007[23]

Nomberg represented Liu until approximately January, 2004. During the first few months following Liu's resignation, Nomberg communicated frequently with Patricia J. Pritchett ("Pritchett"), General Counsel for the University of Alabama Health Services Foundation. Conversations between Nomberg and Pritchett centered around Liu's applications to USC. There was no threat of legal action for a denial of due process. Liu applied to USC for the position of associate professor/academic physician with clinical privileges. USC requested Liu to provide certain information from UAB, specifically concerning the peer review process and his suspension. According to Liu, Pohost communicated from UAB, so that Liu's USC application could proceed. Around January 2001, the parties agreed, all after consultation with their respective counsel, that Bourge would write a recommendation

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23 On February 28, 2007, Liu filed the instant action

letter to USC on Liu's behalf.

a. The recommendation letter.

The following letter dated February 12, 2002, is the result of the conversation between USC, UAB, and Liu[24]:

UAB SCHOOL OF MEDICINE
Department of Medicine
Division of Cardiovascular Disease
CONFIDENTIAL

February 12, 2002
To Whom it May Concern: Re: Ming Wei Liu, MD

This letter is written in response to your written request for a recommendation concerning Dr. Ming Wei Liu. Thank you for providing Dr. Liu's written informed consent.

Dr. Liu came to UAB in October, 1991 as a Research

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24 According to Liu, UAB sometimes fails to release documentation when there is an inquiry by NPDB.

Fellow, upon the recruitment of Dr. Gary Roubin to our institution as head of the Section of Interventional Cardiology. Dr. Liu then became a Visiting Assistant Professor in the Division of Cardiovascular Disease in December, 1992. He joined the faculty as an Assistant Professor on a tenure earning track on June 1, 1992. I have known and worked with Dr. Liu since his arrival at UAB and from September of 1996, I have served as his supervisor in my role of Director of the Division of Cardiovascular Disease.

Dr. Liu is an intelligent, compassionate, and hard working physician. His work ethic is outstanding. In 1997 to 1998, we had the unfortunate circumstance to lose 4 of our 6 interventional cardiology faculty due to retirement or recruitment to other institutions. Ming was instrumental in picking up the vast majority of the clinical load of many interventional procedures until new faculty were recruited over the subsequent 6 months. He has excellent patience and skill in the performance of interventional cardiology and other interventional vascular procedures, as well as the use of a variety of devices to perform these procedures. During his last 4 years at UAB, he was the most clinically

productive interventional cardiologist on our staff. During his tenure, he successfully completed and passed the ABIM subspecialty examination for interventional cardiology. His other academic accomplishments are outline in his Curriculum Vitae.

Unfortunately, in late 2000 and early 2001, it came to my attention that some of Dr. Liu's performed procedures, planned procedures, certain aspects of medical care, and his hospital chart documentation were not within the standard of care at our institution. Because of these problems, and after multiple discussions with myself and the head of the Section of Interventional Cardiology with no change in the pattern of these activities, he was placed on probation by myself and the Chair of the UAB Department of Medicine on July 14, 2001. In October of 2001, it was brought to my attention that certain procedures performed by Dr. Liu continued to be outside of the standard of care at our institution. After a discussion with me regarding these cases, no satisfactory resolution to the problem was obtained. Subsequently, Dr. Liu's medical staff privileges were summarily suspended on October 26, 2001. On November 21, 2001, Dr. Liu resigned his

faculty and medical staff appointment at UAB.

While the above circumstances certainly cast an unfortunate shadow on Dr. Liu's career, he is a highly skilled and compassionate physician. I believe, however, if Dr. Liu was allowed to perform interventional procedures, in an individually supervised fashion over a 12-month period, then he has the ability to be an outstanding addition to the staff at an academic medical center. This supervision should include review of all angiograms with a well qualified interventional cardiology board certified mentor prior to any procedure, and then approval of that mentor prior to proceeding with interventional procedure. Indeed, I would trust him under those well-defined circumstances, to perform a procedure on myself or a member of my family. Upon the satisfactory completion of this 12-month mentorship, he could then move toward a less supervised and more independent position, but with continued indefinite post-hoc peer review of his clinical activities.

I believe that this letter outlines the outstanding positive attributes of Dr. Ming Liu, including his work

ethic, technical proficiency, compassion for his patients, academic achievements, and key clinical issues addressed by our institution. If a position were made available to Dr. Liu within the guidelines outlined above, and he accepted those practice restrictions, I believe he would continue to contribute to outstanding patient care and be [sic] very productive faculty member at your institution.

Sincerely,
Robert C Bourge, MD
Professor of Medicine, Radiology, and Surgery
Director, Division of Cardiovascular Disease.

Upon receiving this letter, USC requested Liu to produce edifying information concerning the year 2001 cases that Bourge said were not within UAB's "standard of care." UAB refused to expand the dialogue, claiming Alabama's peer review privilege. USC still insisted. On at least three separate occasions in 2002, USC requested Liu to produce peer review information from UAB. These requests concerned several topics, including the nature and scope of UAB's investigation, whether

there were any complications and/or unexpected mortalities, and the specific findings of the peer review committee. Upon each request, UAB claimed Alabama's peer review privilege. Liu considers Bourge's letter not to be a "recommendation", but rather a personal attack.

In a letter dated January 24, 2002, Entman wrote to USC at Liu's behest. Entman said in pertinent part:

> Bourge sent me some of [Liu's] cases to review [in my peer review capacity]. . . . . .
>
> Review of the cases revolved around some interesting issues. In fact, there are not clear standards of practice for Interventional Cardiology and the profession tends to collect some very competent but aggressive practitioners. Bourge felt that UAB ought to develop their own standards of practice with regard to interventional cardiology and, I think one of the underlying difficulties was that Liu was somewhat more aggressive. **I will admit that I probably would have done something different with some of the patients that were reviewed but I don't think that decision[s] that were made were beyond what might be expected in some places**. . . . As I am

sure you know, this type of issue arises frequently with creative young faculty and it would be a terrible shame if a career were ruined by some rash political behavior (emphasis supplied).

There is nothing surprising about physicians having differences of opinion about what is the better medical procedure. During this period, Liu not only applied to USC, but also to several other hospitals. On each occasion, he signed extensive releases, waiving all claims against both the requesting hospitals, e.g., USC, and the providing hospital, UAB. In these releases, Liu expressly waived any rights against hospitals resulting from the "disclosure" of peer review materials. Eventually, Liu was granted clinical privileges at hospitals in the Los Angeles area. His continued attempts to gain employment with USC, however, were unsuccessful. Around 2005, USC advised him to go into private practice for one year and reapply. Liu went into private practice; however, he reapplied six months later. USC again denied in the Los Angeles area.[25]

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25 The record creates some confusion as to the number of

Liu's central argument is that Bourge and the Board initiated the peer review process for the purpose of preventing him from receiving a promotion or another increase in salary at UAB. Liu avers that Bourge expressly told him that he was going to force him to resign. Liu likewise alleges Bourge and/or Chapman schemed to force Liu out of UAB because of his high-volume of referrals and patients. Overall, Liu alleges that the peer review process was initiated in bad faith and/or with malice.

II. Pertinent Procedural Issues

A. Liu's Amended Complaint

In his original complaint, Liu asserted both diversity jurisdiction under 28 U.S.C. § 1332(a) and federal question under 28 U.S.C. § 1331. He

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hospitals where Liu is currently employed. Liu's complaint states he is employed with privileges at California Hospital Medical Center and Garfield Medical Center. However, in Liu's deposition, Liu testified he was employed with privileges at White Memorial Medical Center, Good Samaritan, and St. Vincent's Hospital (Los Angeles). The distinction is of no relevance to the court's analysis.

subsequently amended his complaint to add claims under 42 U.S.C. § 1983. The amended complaint supercedes the original complaint. *Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241, 1243 (11th Cir. 2007). As discussed *infra*, Liu now concedes that all claims for monetary damages are barred by the statutes of limitations. However, he has failed to address whether his basis for diversity jurisdiction still exists. Nor has either defendant addressed this issue. The court finds that any basis for diversity jurisdiction disappeared after Liu's concession about the statute of limitations. Bound by the Eleventh Circuit's plaintiff-viewpoint rule, *see Ericsson GE Mobile v. Motorola Communications*, 120 F.3d 216 (11th Cir. 1997), the court must determine whether the possible benefit to be obtained by Liu from the injunction he seeks is sufficiently measurable and certain to satisfy the requisite $75,000 amount in controversy. *Id.* at 221; *see also Fidelity Warranty, Inc. v. Kidd*, 45 F. Supp. 2d 1284 (N.D. Ala. 1999), *aff'd*, 196 F.2d 1262 (11th Cir. 1999), *reh'g en banc denied*, 204 F.3d 1124 (11th Cir. 1999), *cert. denied*, 529 U.S. 1069, 120 S.Ct. 1679 (2000). Assuming that the value of the requested mandatory injunction is not merely the cost of copying

and mailing peer review documents, and includes the possible economic benefit to Liu of obtaining a second chance review of his UAB record by USC and other speculative and immeasurable to satisfy the amount in controversy requirement. If USC should find that UAB appropriately suspended Liu, Liu stands to gain nothing from its review of his performance at UAB. In other words, if this court should grant Liu the relief he seeks, he could be negatively impacted rather than be helped in influencing the hiring decisions of California credentializing committees. Accordingly, there is no basis for a finding of the requisite amount in controversy. The court lacks jurisdiction under 28 U.S.C. § 1332. The court proceeds only because there is federal question jurisdiction under 28 U.S.C. § 1331, and possible supplemental jurisdiction under 28 U.S.C. § 1367(a). Liu's federal and state claims originate from the same common nucleus of operative fact. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130 (1966).

Liu's amended complaint seeks relief both under federal and state law. Liu does not distinguish between defendants. He appears to be aiming all of his claims at both the Board and Bourge. Although ambiguous, Liu

apparently is attempting to sue Bourge both in his official capacity and as an individual. The federal claims by Liu are as follows:

> [**CLAIM 1**]. To the extent that the Alabama peer review statute 1975 Ala. Code §§ 6-5-333 and 22-21-8 prohibits disclosure of peer review information to peer review authorities in other States upon express request of such peer review authorities, it violates the Quality Healthcare Improvement Act of 1986, 42 U.S.C. § 11101, *et seq.*,[26] and is therefore unconstitutional under the Supremacy Clause of the United States Constitution, and the substantive and procedural due process of law, and equal protection of law under the Fourteenth Amendment thereof.
>
> [**CLAIM 2**]. To the extent that the Quality Healthcare Improvement Act of 1986, 42 U.S.C. § 11101, *et seq.*
>
> permits the non disclosure of peer review

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The statute is named the Healthcare Quality Improvement Act of 1986 42 U.S.C. § 11101, *et. seq.*, not the Quality Healthcare Improvement Act. *See* HCQIA, Pub. L. No. 99-660, § 401, 100 stat. 3743 (1986). The court assumes this is a typographical error.

information to peer review authorities in other States upon express request of such peer review authorities, it violates the substantive and procedural due process of law, and equal protection law provisions of the Fourteenth Amendment of the United States Constitution, and is therefore unconstitutional.

[**AMENDMENT**] The acts and omissions of the Defendants as described herein were taken under color of law and deprived Plaintiff of his rights to substantive and procedural due process of law resulting in damage to him; all in violation of 28 U.S.C. §§ 1983, 1988. The Defendant Bourge knew, or should have known, that his acts and omissions as described herein violated the clearly established constitutional rights of the plaintiff.

In his amendment, Liu added the section styled "amendment." This "amendment" does not make clear whether it is intended to apply to both preceding claims. Despite this ambiguity, the court finds that Liu intended it to apply both to claim 1 and to claim 2, and treats it as such.

Liu also invokes the law of California and the law of

Alabama. Liu attempts to present two claims under California law. He styles one "Intentional Interference with Prospective Economic Advantages" and the other "Implied Cause of Action Under California Business and Professional Codes." Under Alabama law, Liu makes only one claim, which he styles "Cause of Action for Intentional Interference with a Business or Contractual Relation."

Liu initially sought money damages as well as equitable relief. As discussed, above and below, Liu concedes that money damages are not recoverable. Accordingly, Liu's prayer for relief is limited to declaratory and injunctive relief.

b. Statute of Limitations Concession and Equitable Tolling

In Liu's filing styled "Consolidated Response to Defendants' Motions for Summary Judgment," Liu concedes that his claims for damages are time-barred. In *Wilson v. Garcia*, 471 U.S. 261, 268-69, 105 S. Ct. 1938, 1943-44 (1985), the Court held that claims under 42 U.S.C. § 1983 borrow the pertinent state's statute of limitations for personal injury actions. The

statute of limitations for personal injury actions in Alabama is two years. Ala. Code § 62-38 (1975).[27]

Liu requests that the anticipated dismissal of his time-barred claims be without prejudice, because he desires a "re-filing in the event facts emerge that would justify a good-faith 'tolling' argument; particularly if any additional 'To Whom it May Concern' letters emerge later." The court denies Liu's request for such a reprieve. Federal courts should "generally refer[] to state law for tolling rules", and "[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace v. Kato*, 127 S.Ct. 1091, 1098-99 (2007)(citations omitted). There appears to be nothing uncommon about a litigant failing to unearth what he hoped to find in discovery. Liu having provided no justification for an invocation of the doctrine of equitable tolling, his time-barred § 1983 damage claims will be dismissed with prejudice.

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27 California's statute of limitations for personal injury actions is likewise two years. Cal. Civ. Proc. Code § 335.1 (2002).

C. What Claims Remain?

Liu's complaint, as amended, contains two federal claims and several state law claims. In federal claim 1, Liu contends that Alabama peer review statues are unconstitutional under the Supremacy Clause to the extent that they transgress upon the provisions of the Healthcare Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11101, *et seq.*, and that they violate substantive due process, procedural due process, and equal protection. In federal claim 2, Liu alleges that to the extent the HCQIA is construed to countenance non-disclosure of peer review information to peer review authorities in other states, the nondisclosure violates his substantive, procedural, and equal protection rights. In his motion for partial summary judgment, he argues only that his "substantive and procedural rights" were violated, and he makes no Supremacy Clause argument, arguably abandoning it. The fact that Liu filed his motion for partial summary judgment prior to his concession of no entitlement to money damages exacerbates the problem of determining what is left.

In Liu's earlier response to defendants' motions to

dismiss, he said that he was relying on two legal theories, "[v]iolation of [his] Fourteenth Amendment right to pursue his chosen profession as a medical clinical educator, and violation of state laws prohibiting the intentional interference with business and economic relations." Liu does not satisfactorily explain how the Fourteenth Amendment establishes a right to pursue one's chosen calling.

III. The Board's Motion for Summary Judgment

In ruling on the Board's Rule 56 motion, the court begins and ends with its agreement with the Board's challenge to jurisdiction.

The Board interposes the immunity provided by the Eleventh Amendment,[28] which applies to § 1983 claims.

28

The scope of the Eleventh Amendment to the United States Constitution is textually limited: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. However, a facial reading of the Amendment has been rejected by the Supreme Court. *See Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890). As a result, the States' sovereign immunity in federal court is vast.

Quern v. Jordan, 440 U.S. 332, 340-41, 99 S.Ct. 1139, 1144-45 (1979). If the suit against the Board is barred by the Eleventh Amendment, the court need not address the adequacy of Liu's claims against the Board or the Board's non-jurisdictional defenses.

To determine whether the Eleventh Amendment immunizes a particular governmental entity from suit in federal court, the court must conduct a multi-tiered analysis. First, the court must determine if the governmental entity is an arm or instrumentality of the state. The Board is. *See, e.g., Harden v. Adams*, 760 F.2d 1158 (11th Cir. 1985), *cert. denied sub. nom. Grimmer v. Harden*, 474 U.S. 1007, 106 S. Ct. 530, 88 L. Ed. 2d (1985)("The Alabama Supreme Court has held . . . that state universities . . . are agencies or instrumentalities of the state.")(citations omitted). Next, the court must determine if the state entity has waived its Eleventh Amendment immunity and/or whether Congress has lawfully abrogated the state's Eleventh Amendment immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d (1976). If Eleventh Amendment immunity is not waived or expressly abrogated, the Eleventh Amendment serves as an absolute bar. *See Pennhurst State Sch. & Hosp. v.*

Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). It also applies "regardless of whether the plaintiff seeks money damages or prospective injunctive relief." *Stevens v. Gay*, 864 F.2d 113, 115 (11th Cir. 1989)(citing *Pennhurst*, 465 U.S. at 100-101, 104 S. Ct. at 907-908).

There is absolutely no basis for an argument that Alabama has waived its Eleventh Amendment immunity, leaving the court only with the question of whether Congress has expressly abrogated the Eleventh Amendment immunity under these circumstances. In order to determine whether Congress has abrogated Eleventh Amendment immunity, the court must first determine whether Congress has "unequivocally expressed its intent to abrogate the immunity, and, second, whether Congress has acted pursuant to a valid exercise of power." *Seminole Tribe of Florida v. State of Florida*, 517 U.S. 44, 55, 116 S. Ct. 1114, 1123 (1996)(internal punctuation and citations omitted).

It is clear that there is nothing in § 1983 that purports to abrogate Eleventh Amendment Immunity. In order to determine whether Congress intended to abrogate the States' sovereign immunity through the HCQIA, the court looks to the text and plain meaning of

the statute. In § 11115(a)("Construction") of the HCQIA, for sub-chapter I, 42 U.S.C. §§ 11111-11115, Congress provides:

> Except as specifically provided in this sub-chapter, nothing in this sub-chapter shall be construed as changing the liabilities or immunities under law or as preempting or overriding **any** State Law which provides incentives, **immunities**, or protection for those engaged in a professional review action[29] that is

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The HCQIA provides the following definition of "professional review action":

> [A]n action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action.
>
> . . .

42 U.S.C. § 11151(9). A "professional review body" is defined as a "healthcare entity and the governning body or any committee of a healthcare entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity. 42 U.S.C. § 11151(11). A "professional review activity" is

in addition to or greater than that provided by this sub-chapter.

42 U.S.C. § 11115(a)(emphasis supplied). This court concludes that Congress did not intend the HCQIA to abrogate Eleventh Amendment immunity. Indeed, in passing the HCQIA, Congress intended the exact opposite. *See id.* The court need not address the "valid exercise of power" issue under § 5 of the Fourteenth Amendment. The Board is an Alabama instrumentality, Alabama has expressly preserved its Eleventh Amendment immunity, and Congress has not abrogated it under the HCQIA. The Board is immune from suit in this court.

The court has no jurisdiction to consider any of Liu's claims against the Board. All claims against the Board

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defined as:

> "[A]n activity of a healthcare entity with respect to an individual physician:
>
> 1. to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,
> 2. to determine the scope or conditions of such privileges or membership, or
> 3. to change or modify such privileges or membership.

42 U.S.C. § 11151(10).

will be dismissed.

IV. Bourge's Motion for Summary Judgment

Turning to Liu's § 1983 claims against Bourge, the court notes the problem that pokes its head up too often in § 1983 cases, namely, how to determine when a person is being sued only in his official capacity, or only in his individual capacity, or in both capacities. While Liu makes no effort in his complaint to address this distinction, the proceedings fail to suggest logically that Bourge is being sued in any capacity other than his official capacity. *See Colvin v. McDougall*, 62 F.3d 1316, 1318 (11th Cir. 1995)("In trying to determine in what capacity [defendant] was sued, we look at the complaint and the course of proceedings.")(citation omitted); *see also Young Apartments v. Town of Jupiter, Fla.*, 529 F.3d 1027, 1048 (11th Cir. 2008)(solidifying the holding of *Calvin*; noting that the Eleventh Circuit utilizes what it calls the "course of proceedings test"). Even if Liu had specifically alleged that Bourge is liable as an individual, Liu's concession that he cannot recover money damages forecloses the possibility that any individual capacity claims, even equitable, can remain against Bourge. Even an injunction against Bourge in

his official capacity would prove difficult, if not impossible, to enforce if it should mandate that Bourge disgorge peer review materials that are not in his custody or control. The court will assume for the purposes of the following discussion that Bourge is being sued only as an official of the Board.

A. Does the Eleventh Amendment bar Liu's claims against Bourge?

The court must determine whether Liu's equitable claims against Bourge in his official capacity under § 1983 are barred by the Eleventh Amendment, as are the claims against the Board. Liu contends that the legal fiction of *Ex parte Young* gets around the Eleventh Amendment because he seeks only prospective equitable relief against a named state official. *See Ex parte Young*, 209 U.S. 123 (1908), *and Verizon Maryland, Inc. v. Public Svc. Comm'n*, 535 U.S. 635, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002). In *Verizon*, the Court instructed: "[I]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of

federal law and seeks relief properly characterized as prospective." *Id.* at 645 (citations and internal quotations omitted). Conducting *Verizon's* straightforward inquiry, the court finds, assuming the relief Liu seeks is granted, namely, the release of peer review documents and files, that it will be prospective. Furthermore, such relief will not subtract in any significant way from the state treasury. It is equitable in nature, so that Liu's official capacity claims against Bourge can proceed, if only in theory.

B. Does the statute of limitations bar Liu's equitable claims?

Before turning to the merits of Liu's § 1983 claim against Bourge, the court must deal with Bourge's statute of limitations defense. Bourge says that the statute of limitations bars Liu's claims for both legal *and* equitable relief. Bourge contends that Liu's equitable claims, like his damage claims, are time-barred. Bourge says that the "concurrent remedy doctrine" applies and that the equitable and legal statute of limitations are the same. The court respectfully disagrees. Rather self-defining, the

concurrent remedy doctrine stands for the proposition that "where a party's legal remedies are time-barred, that party's concurrent equitable claims generally are barred . . . ." *Nat'l Parks & Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 502 F.3d 1316, 1326-27 (11th Cir. 2007)(citations omitted). Although Liu poorly expresses his contention, he must be depending upon an exception, the "continuing violations doctrine,"[30] holding that the limitations period will be tolled if there is a "a continuing violation into the present." *Id.* at 1322 (internal quotation marks and citations omitted). Assuming that this problem even applies to a claim under *Ex parte Young*, a dubious proposition,[31]

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30 The continuing violations doctrine is defined as:

> [T]he statute of limitations is tolled for a claim that otherwise would be time-barred where the violation giving rise to the claim continues to occur within the statute of limitations period. In determining whether to characterize a violation as continuing, it is important to distinguish between the present consequences of a one-time violation, which do not extend the limitations period, and a continuation of a violation into the present, which does.

Nat'l Parks & Conservation Ass'n, 502 F.3d at 1322 (citations and internal quotations omitted.

31 Defendants have not cited a case where the concurrent remedy doctrine has barred relief via *Ex parte Young*. Liu has likewise failed to rebut this claim with any precedent whatsoever.

the court finds that if Liu's claims are meritorious, the concurrent remedy doctrine does not apply. Put simply, if there is an ongoing violation of federal law, as Liu claims, there must be a "continuing violation." If Liu's claims have merit, and if the failure to disclose documents is a violation of due process, the continuing failure of Bourge to disclose the documents is probably an ongoing violation. Bourge's statute of limitations defense does not apply to prospective equitable relief. Also of note, Bourge's defense of qualified immunity does not apply to prospective relief. *Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993)(noting that there is no qualified immunity defense for equitable relief). If Bourge were being sued for money damages under § 1983, he would most assuredly be qualifiedly immune.

C. Section 1983 Framework

It goes without saying that § 1983 creates only a cause of action, and not a specific, federally protected

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The court has likewise not found any persuasive precedent that discusses the interplay between *Ex parte Young* and the continuing violations doctrine. The court is unconvinced that the concurrent remedy doctrine applies here.

right. As the Eleventh Circuit has instructed:

> To state a claim for relief in an action brought under § 1983, plaintiffs must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law. Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful. *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1276-77 (11th Cir. 2003) (quoting *American Mfrs. Mut. Ins. Co .v. Sullivan*, 526 U.S. 40, 49-50, 119 S. Ct. 977, 985, 143 L. Ed. 2d 130 (1999)). In other words, Liu must prove that Bourge is a person acting under the color of state law, who, while so acting, caused a violation of a federal statute or of the U.S. Constitution. *See Hale v. Tallapoosa County*, 50 F.3d 1579, 1581 (11th Cir. 1995). The requirement of "under the color of state law" has been treated the same as "state action" for Fourteenth Amendment purposes. *See id.* at 1276

n.4.[32] The disputed question is whether Bourge's conduct, and his invocation of Alabama's peer review privilege, deprived Liu of a federally protected right, namely his constitutional right to due process and/or his federal right under the HCQIA.

D. The Merits: Deprivation of a Federal Right?

Liu argues: (1) that Alabama's peer review statutes violate the Supremacy Clause based on his interpretation of the "essential purpose" of the HCQIA; (2) that Alabama's peer review statutes do not apply in this court pursuant to Rule 501 of the Federal Rules of Evidence; (3) that even if they do, they only require a "need to know" rule of confidentiality, and alternatively, that Bourge's actions were taken in bad faith and/or

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In the instant action, no party disputes that Bourge is a "person" for purpose of § 1983. Nor do the parties dispute that Bourge's action was not "state action." Prior to Liu's concession on damages, Bourge disputed whether he was a "person" for purposes of § 1983. However, post concession, Bourge wisely omitted any defense that he was not a "person" for purposes of equitable relief. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989)(holding that state officials were persons for the purposes of § 1983 when sued in their official capacity for prospective relief).

with malice; and (4) that if Rule 501 precludes the invocation of Alabama's peer review statutes, Liu's substantive, procedural, and equal protection rights were violated, thus establishing a violation of a federal right. Before turning to these myriad arguments, the court will discuss the pertinent portions of the applicable statutes.

1. The HCQIA and Alabama's peer review statutes

When it passed the HCQIA, Congress found, in the text of the statute itself, that "[t]he increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State." 42 U.S.C. § 11101(1). Congress also found that there is a "national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of their [previous incompetence]." *Id.* at § 11101(2). This problem, Congress stated, "can be remedied through effective professional peer review", and because physicians fail to engage in effective peer review because of potential money damages, they need

protection. *Id.* at § 11101 (3) - (5); *see also Bryan,* 33 F.3d at 1321-23 (discussing additional legislative history). Assuming that certain due process notice and fairness requirements are met, HCQIA immunity attaches to the physicians and the hospital. *See id.* at § 11111(a)(1).

Of particular relevance here, the HCQIA requires "healthcare entities" to report certain data to the NPDB. *Id.* at § 11133. The statutory definition of healthcare entity includes "a hospital that is licensed to provide healthcare services by the State in which it is located . . ." *Id.* at § 11151(4)(A)(I). If a healthcare entity takes:

> professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days [or] accepts the surrender of clinical privileges of a physician while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, [then the healthcare entity] shall report to the Board of Medical Examiners, in accordance with section 11134(a) . . ., the information described in paragraph (3).

42 U.S.C. § 11133(a). Section 11134(a) requires regular

reporting of the information ("but not less often than monthly") and in such form and manner that the Secretary of Health and Human Services prescribes. *Id.* at 11134(a). Paragraph (3), "information to be reported," provides:

> The information to be reported under this subsection is:
>
> (a) the **name** of the physician or practitioner involved, (B) a **description** of the acts or omissions or other reasons for the action or, if known, for the surrender, and
>
> (c) such other information respecting the circumstances of the action or surrender as the **Secretary deems appropriate**.Id.at 11133(a)(3)(emphasis supplied).

If the healthcare entity fails to comply with these requirements, amongst other repercussions, the entity loses its protection from money damages. *See id.* at 11133(c). Of note, the Secretary has issued a series of regulations, 45 C.F.R. §§ 60.1-60.14, wherein the Secretary has deemed appropriate a few more requirements, none of which relate to the substantive nature of the peer review process. *See* 45 C.F.R.

60.9(a)(3)(adding reporting requirements such as date of birth and professional license numbers).

Importantly, HCQIA immunity does not preclude equitable relief. *See id.* at § 11111(a)(1); *see also Bryan*, 33 F.3d at 1323 n.4 ((citing H.R. Rep. No. 903, 99th Cong., 2d Sess. 2, *reprinted in* 1986 U.S.C.C.A.N. 6287, 6391); instructing that the HCQIA "does not restrict the rights of physicians who are disciplined to bring private causes of action for injunctive or declaratory relief"). There also is no private right of action for an aggrieved physician to sue peer review physicians under the HCQIA, in part, because Congress did not enact the HCQIA for the benefit of physicians. *See Bok v. Mutual Assurance, Inc.*, 119 F.3d 927 (11th Cir. 1997).

The Alabama statutes in question are §§ 22-21-8, 6-5-333, and 34-24-58, hereinafter collectively referred to as Alabama's peer review statutes. Section 22-21-8 states in pertinent part:

> All accreditation, quality assurance credentialing and similar materials **shall be held in confidence** and shall not be subject to discovery or introduction in evidence in any civil action against a healthcare professional or institution arising out of matters which are the subject of evaluation and review for

accreditation, quality assurance and similar functions, purposes, or activities. No person involved in preparation, evaluation or review of accreditation, quality assurance or similar materials shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the course of preparation, evaluation, or review of such materials or as to any finding, recommendation, evaluation, opinion, or other action of such accreditation, quality assurance or similar function or other person involved therein.

Ala. Code § 22-21-8(b) (1975)(emphasis supplied).

Section 6-5-33 states in pertinent part:

All information, interviews, reports, statements, or memoranda furnished to any committee as defined in this section, and any findings, conclusions, or recommendations resulting from the proceedings of such committee are declared to be privileged. The records and proceedings of any such committees shall be confidential and shall be used by such committee and the members thereof only in the exercise of the **proper functions** of the committee

> and shall not be public records **nor be available for court subpoena or for discovery proceedings**.
>
> Ala. Code § 6-5-333(d) (1975)(emphasis supplied).

Assuming that they performed in "**good faith and without malice**," neither a peer review committee, nor any "member thereof shall be liable for such decision, opinion, action, or proceeding." *See* Ala. Code § 34-24-58 (1975)(emphasis supplied).

A. Preemption.

Liu argues that the HCQIA preempts Alabama's peer review statutes under the Supremacy Clause. Supremacy Clause jurisprudence is divided into three categories, namely, express preemption, field preemption, and conflict preemption. *See, e.g., Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1167-68 (11th Cir. 2008)(defining each category)(citations omitted). "Congressional intent governs our determination of whether federal law preempts state law." *Boyes v. Shell Oil Products Co.*, 199 F.3d 1260 (11th Cir. 2000)(citing *Gade v. Nat'l Solid*

Waste Mgmt., 505 U.S. 88, 96, 112 S. Ct. 2374, 2381 (1992)(plurality)("The purpose of Congress is the ultimate touchstone.") Neither express nor field preemption applies here. *See Browning*, 522 F.3d at 1167-68. There is nothing in the text of the HCQIA that manifests an intent to displace state law, thus no express preemption. Further, the HCQIA is not such a pervasive scheme that it cannot tolerate a state supplement to the HCQIA law, thus no field preemption. See id. Rather, as discussed *supra*, Congress intended just the opposite. *See* 42 U.S.C. § 11115(a). Insofar as Liu has a colorable claim, conflict preemption provides his only possible avenue for preemption. "Conflict preemption occurs either when it is physically impossible to comply with both the federal and the state laws or when the law stands as an obstacle of the federal law." Id.at 1167. Here, the only possible source of preemption is obstacle preemption. Obstacle preemption has been further refined as "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *This That and Other Gift and Tobacco, Inc. v. Cobb County, Ga.*, 285 F.3d 1319, 1322 (11th Cir. 2002)(internal quotation marks and citation omitted).

Liu argues that the "rationale of the HCQIA is to encourage the exchange of peer review information among credentializing authorities in different states and to immunize those who participate in peer review from civil suit." Also, he argues that the "express legislative purpose of HCQIA is . . . to discover incompetency of physicians who move from one state to another to avoid discovery of quality care issues." The court respectfully disagrees. The purpose of the HCQIA is to protect patients from medical malpractice via mandatory reporting to the NPDB, to immunize peer review committees and hospitals from damages, and to improve the quality of the nation's healthcare. Congress envisioned protecting physicians such as Liu to the extent of the notice and hearing requirements of § 11112(a). However, outside of these protections, the purpose of the HCQIA is not to guarantee someone in Liu's position (or to his prospective employers) access to otherwise privileged materials. Again, the persons targeted for protection are physicians engaged in peer review, and patients. Congress did not intend to require or encourage peer review committees to engage in the state-to-state, free-flowing exchange of peer review materials. If Congress had wanted to require hospitals to provide more information to the NPDB (and/or

interested third parties) than the name of the physician involved and a description of events, it could have done so. Instead, Congress left room for the Secretary to add to the requirements. The Secretary's additional requirements have been merely administrative in nature. The bottom line is that if Congress had wanted to preempt this or similar state law privileges, it could have done so.

The Alabama statutes themselves present no obstacle to the accomplishment of the Congressional purposes in the HCQIA. If Liu's flawed interpretation of the HCQIA had merit, Alabama's peer review statues would arguably frustrate the purpose of exchanging peer review files from state to state. In other words, if a physician in State "A" receives an adverse action by a peer review committee in State "A," then moves to State "B," and requests an independent peer review in State "B," Congress could have written into the HCQIA such a "second chance" for physicians. Congress chose not to do so. Instead, Congress' language and purpose expresses a conscious choice not to erode states' peer review protection. Alabama's peer review statutes only provide additional protection to peer review committees and do not preclude reporting to the NPDB or

identifying physicians who may have committed malpractice. The Congressional purpose is not impeded by Alabama's peer review statutes.

B. Alabama's peer review statutes and Federal Rule of Evidence 501

Both Bourge and Liu move for summary judgment on Liu's claim of a violation of substantive and procedural due process rights. Liu argues that Alabama's peer review statutes do not apply in federal question cases, and urges the court to order the production of the peer review materials to USC and to Liu's other prospective employers under Fed. R. Evid. 501. Liu relies heavily on the Eleventh Circuit decision in *Adkins v. Christie*, 488 F.3d 1324, 1328 (11th Cir. 2007), *reh'g en banc denied,* 255 Fed. Appx. 498 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 903, 169 L. Ed. 2d 785 (2008), discussed in detail *infra.* Liu argues that like the *Adkins* court, this court should find that Fed. R. Evid. 501 precludes the application of Alabama's peer review statutes and that "since *Adkins* refused to permit the medical peer review privilege to shield the discovery in litigation of peer review information, it follows that

the privilege cannot be used to shield disclosure to sister state credentializing authorities." This is a non-sequitur. There is a material difference between a rule of evidence applicable in court proceedings and a right of access to that same evidentiary material outside court proceedings. Fed. R. Evid. 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

In interpreting this rule, the Eleventh Circuit has instructed that "[t]he Federal Rules of Evidence empower the federal courts to 'continue the evolutionary of [evidentiary] privileges.'" *Adkins*, 488

F.3d at 1328 (quoting *Trammel v. United States*, 455 U.S. 40, 47, 100 S. Ct. 906, 910 (1980)) (alteration in original). "However, these privileges remain disfavored and should not be lightly created." *Id.* (citation omitted). "Inasmuch as testimonial [. . .] privileges contravene the fundamental principle that the public . . . has a right to every man's evidence, any such privilege must be strictly construed." *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189, 110 S. Ct. 577, 582 (1990)(second alteration in original)(internal quotation marks and citations omitted). In interpreting this rule, the Eleventh Circuit has instructed that "[t]he Federal Rules of Evidence empower the federal courts to 'continue the evolutionary development of [evidentiary] privileges.'" *Adkins*, 488 F.3d at 1328 (quoting *Trammel v. United States*, 455 U.S. 40, 47, 100 S. Ct. 906, 910 (1980))(alteration in original). "However, these privileges remain disfavored and should not be lightly created." *Id.* (citation omitted). "Inasmuch as testimonial [. . .] privileges contravene the fundamental principle that the public . . . has a right to every man's evidence, any such privilege must be strictly construed." *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189, 110 S. Ct. 577, 582 (1990)(second alteration in

original)(internal quotation marks and citations omitted). "Accordingly, there is a presumption against privileges which may only be overcome when it would achieve a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Adkins,* 488 F. 3d. At 1328 (internal quotation marks and citation omitted). Liu is correct in contending that state law privilege does not necessarily apply in federal question cases. *See* Fed. R. Evid. 501, Conference Report; *see also Adkins,* 488 F. 3d at 1324. It does not follow that if the privilege is not available under Fed. R. Evid. 501, in a court proceeding, the court must order the production of the evidence to out of state peer-review authorities.

In *Adkins*, the plaintiff-physician, Adkins, a black male, sued his former employer and several peer review physicians under 42 U.S.C. §§ 1983 and 1981 for racial discrimination arising out of a peer review process that resulted in his suspension and eventual termination. *See Adkins*, 488 F.3d at 1324. Adkins, a newly hired physician at Houston Medical Center ("HMC"), was given provisional status at HMC for one year in accordance with HMC's bylaws. However, HMC extended Adkins's provisional status for six months

based on his "alleged[ ] fail[ure] to follow protocols for preadmission of surgical patients, fail[ure] to complete medical records in a timely manner, and [ ] problems with availability for call." *Id.* at 1326. In addition, Adkins claimed that despite his good record, HMC placed "additional conditions" on his employment. Adkins also alleged that "HMC deliberately mishandled the care of one of his patients [ ] and later used that case as a pretext to take action against him." *Id.* at 1326. HMC disputed these claims, based in part on Georgia's peer review privilege. The district court concluded that the privilege applied in federal civil rights actions, yet ordered HMC to provide Adkins with "descriptions of all incidents giving rise to peer review without disclosing the documents themselves." *Id.* at 1327. The trial court allowed limited discovery of HMC peer review documents covering *other* physicians it deemed to be "similarly situated" to Adkins. *Id.* at 1328. After an in-camera review of this other material, the district court granted summary judgment to HMC. The Eleventh Circuit refused to apply Georgia's medical peer review privilege and accordingly vacated and remanded the case for the discovery of Adkins's peer review material. The

Adkins court balanced the factors set forth in *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923 (1996). The *Jaffee* factors include: "1) the needs of the public good; 2) whether the privilege is rooted in the imperative need for confidence and trust; 3) the evidentiary benefit of the denial of the privilege; and 4) consensus among the states." *Id.* at 1328 (quoting *Jaffee*, 518 U.S. at 10-16, 116 S. Ct. at 1928-31). The *Adkins* court agreed with HMC's arguments that confidential peer review served important interests such as vigorous oversight, thus supporting the "public good" factor. *Id.* at 1328. It likewise agreed that there is a consensus among the states, in fact, that all fifty states recognize such a privilege. *Id.* at 1330. However, the court held that in light of the principles disfavoring recognition of new privileges and balanced with the "corresponding and overriding goal [of] discovery of evidence essential to determining whether there has been discrimination in employment," Georgia's medical peer review privilege did not apply. *Id.* at 1328-29. The *Adkins* court emphasized that "[h]ere we are confronted with a claim of racial discrimination within the peer review process itself, implicating the important social goal of eliminating employment discrimination." *Id.* at 1329

(citation omitted). The most obvious distinction between Adkins and Liu is that Liu is not claiming discrimination. He is only seeking third-party access to materials privileged under Alabama state law.

The court will not expansively extend the reasoning of *Adkins* to cover Liu's circumstances. Liu is not alleging wrongful discrimination. Liu has not cited, nor has the court found, any decision extending the *Adkins* reasoning to circumstances like these. Liu avers that "since *Adkins* refused to permit the peer review privilege to shield the discovery in litigation of peer review documents, it follows that the privilege cannot be used to shield disclosure to sister state credentializing authorities." As previously stated, this reasoning is flawed. There is a fundamental difference in "purpose" here. Adkins's purported purpose was to prove intentional discrimination as the cause of HMC's adverse peer review action. Liu seeks to prove that Bourge's actions were a violation of due process because Bourge intended to prohibit him from engaging in his chosen profession. Assuming that the *Jaffee* factors apply here, the same factors that supported HMC support Bourge. However, the same factors that supported Adkins do not support Liu. Liu is not asking

for the documentation to prove anything to this court. Instead, he wants to begin a "second chance" proceeding out of state, and arguably as many chances *ad infinitum* with as many different peer review committees as he needs or wants. In reality, he seeks to represent USC, a non-party. Setting aside the troublesome administrative issues such an expansive rule would create, this court finds that, unlike *Adkins*, there is no overriding social goal calling for the opening of this Pandora's box. Whereas in *Adkins,* the added important social goal was eliminating employment discrimination, allowing aggrieved physicians who failed to avail themselves of peer review proceedings (possibly ignoring the advice of counsel) to return later and demand another proceeding in another state is not a goal that calls for a sea change in the law. If Liu had participated fully in UAB's peer review process, rather than making an informed decision to resign from UAB, there might be a basis for arguing that the Alabama peer review privilege does not apply, but such an argument is not available to Liu. Despite the disfavoring of privileges, the court finds that Alabama's peer review privilege applies here and was properly and reasonably invoked by Bourge. Assuming that Alabama's peer review statutes do not apply in a federal court proceeding, and

that the *Adkins* reasoning can be extended to Liu, the court has another reason for ruling for Bourge, namely, that Liu failed to demonstrate that Bourge violated any federal right, a matter to be discussed *infra*.

Liu tries to stay alive by relying upon a "need to know" rule of confidentiality, and by claiming bad faith and/or malice by Bourge. The Alabama Supreme Court has never recognized a "need to know" exception to the privilege attaching to peer review materials. In interpreting § 22-21-8, the Alabama Court has held that the purpose of full candor in the peer review proceedings is only advanced if "all documents" considered during the process are protected in order to encourage self-regulation by the medical profession. *Ex parte Krothapalli*, 762 So. 2d 836, 839 (Ala. 2000)(citations and internal quotations omitted). Additionally, the Alabama Court in *Kingsley v. Sachitano*, 783 So. 2d 824 (Ala. 2000), addressed a situation not unlike the instant case. Kingsley, a vascular surgeon, sued three other physicians for various torts, including negligence and wantonness in a peer review decision. *Id.* When Kingsley subpoenaed the peer review documents from the hospital, the hospital objected, exercising its privilege under § 22-21-8. *Id.* at 825. The trial court

agreed with the objection and quashed the subpoena. *Id.* The trial court reasoned that based on the plain meaning of Alabama's peer review statutes, without evidence of bad faith or malice, the peer review documents were privileged. *Id.* The Alabama Court affirmed, holding that the trial court had not abused its discretion, reasoning that the sweeping language of § 22-21-8 required the protection. *Id.* at 828.

Liu maintains that *Ex parte Cryer*, 814 So. 2d 239 (Ala. 2001), stands for the proposition that "materials protected by § 22-21-8 are limited to those prepared by a 'hospital, clinic, or medical staff'", and that documents prepared outside of those circumstances are available for release to out of state peer review authorities. Liu's Response to Defendants' Motions to Dismiss at 12. In *Cryer*, a doctor's handwritten notes prepared for a meeting with physician shareholders were found not to be privileged, in a suit later for malpractice. *Id.* Liu reads *Cryer* too broadly. The Alabama Court was careful to point out that the "statements at issue in this case did not constitute part of a peer-review process" and for that reason were not discoverable. *Id.* at 246.

Here, Liu is correct in arguing that Alabama's peer review statutes apply primarily to litigation. However,

their sweeping language, "held in confidence . . . [not] available for court subpoena" coupled with the purpose of maintaining the confidentiality of "all documents," demonstrates that the Alabama legislature intended an almost hermetically sealed status for all peer review documents. Liu also misreads *Cryer*, which actually strengthens the legislative lock on peer review documents. To create an exception on a "need to know" basis, sanctioning the disclosure to peer review authorities out of state, would erode the plain meaning, purpose of the statutes, and their interpretation by the Alabama Supreme Court. Such an exception would effectively rewrite the Alabama statutes.

The court does not find Liu's allegations of bad faith or malice to be supported by the evidence. Even viewing actions of Bourge and inferences to be drawn from them in a light most favorable to Liu, the court cannot conclude that any evidence exists upon which a jury could reasonably find that Bourge acted in bad faith or with malice. Bourge was not even on the peer review group, and he only invoked Alabama's privilege that this court finds a legitimate one. How can a person be guilty of violating the law for following the law? Hospitals have an obvious interest in ensuring that

their staff physicians conduct themselves in an ethical and professional manner. *See, e.g., Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 469 (6th Cir. 2003)("'Quality healthcare' is not limited to clinical competence, but includes matters of general behavior and ethical conduct."). It is not the function of this court to determine the frequency with which physicians must visit their patients, the appropriate time of day or night to operate (or to not operate), or more generally, to begin taking sides on the appropriate standard of care. Liu's difficulties with Bourge and Chapman are those of general behavior andclinical competence, well within the purview of Bourge's authority and responsibility. This, coupled with the PCTA/PCI bypass and hematoma issues, demonstrates that Bourge's decision to place Liu on probation and his decision to refer Liu to peer review was no more in bad faith or malicious than his decision not to release the peer review materials to USC. Bourge's actions were well within the discretion he was granted by UAB's bylaws. The fact that the non-UAB reviewer selected by Liu said that "he would have done some things differently" does not change the law. It is only his opinion. Likewise, if this court were authorized to make a *de novo* finding of what discipline, if any, should have

been administered to Liu, the court might have reprimanded and admonished him, warned him to get along better with his peers, advised him to visit patients each day as instructed, and told him not to angrily tell his new boss that he did not approve of his selection. Likewise, the court might have advised Liu to participate fully in the peer review process. The court might also have suggested that both he and Bourge take the Dale Carnegie course. However, the court was not awarded such an advisory role. The court is only required to determine whether Liu has presented sufficient facts to overcome Bourge's motion for summary judgment. Viewing all of Bourge's actions in a light most favorable to Liu, the court cannot find an evidentiary basis for a finding that Bourge acted in bad faith or with malice. There is simply no basis for circumventing Alabama's peer review statutes. They provide Bourge another layer of protection under these circumstances from a § 1983 claim.

C. Substantive and Procedural Due Process and Equal Protection

Section 1983 requires Liu to demonstrate the

violation of a federal right. Liu's conclusory allegation that his substantive due process rights were violated are without colorable merit. Liu cites *Cleveland Bd. Of Educ. v. LaFleur*, 414 U.S. 632 (1974), for the proposition when a state creates a conclusive presumption that a person cannot perform his or her chosen profession, the state action is a violation of substantive due process. The court cannot see how Bourge, in his official capacity, acting for the state, could have created such a presumption applicable to Liu and all similarly situated individuals. In *LaFleur*, the Court struck down certain school board rules that violated the due process clause. *Id.* The rules required pregnant teachers to take five to six months of maternity leave. *Id.* The rules violated the due process clause only because they created the conclusive presumption that a woman who was five to six months pregnant is incapable of continuing in her job. *See id.* Bourge points to *Boyett v. Troy State Univ.*, 971 F. Supp. 1403 (M.D. Ala. 1997), where a professor sued a state university for failing to reappoint him. In *Boyett*, the deciding court failed to recognize any substantive due process right, because, *inter alia*, the professor failed to present any evidence that he was precluded from

"pursuing his profession with all employers." *Id.* at 1414. *LaFleur's* reasoning is not applicable. Boyett's reasoning fits perfectly. No conclusive presumption arises from anything that Bourge did or did not do. There is no conclusive presumption that Liu cannot perform interventional cardiology. In fact, he is currently employed by several hospitals. And, assuming that private practice for one year. *Boyett* applies in that Liu has clearly not been prevented from employment with "all employers." He has at least two clinically privileged positions. The record does not reflect that he has ever applied for a teaching position at any educational institution other than USC. Liu simply has no substantive due process claim.

Liu also claims that Bourge was deprived him of procedural due process. In order to prevail on a procedural due process claim, a plaintiff must first demonstrate the existence of a property or liberty interest. Liu fails to cite any case for the proposition that he has been deprived of either of these interests, much less that he was so deprived by the HCQIA or by Bourge's reliance on Alabama's peer review statutes. Property interests are defined by state law. *See Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L.

Ed. 548 (1972). And Liu has not pointed to any state law giving him, or, vicariously USC, a property right in the disputed peer review materials. In fact, Alabama's peer review statues are diametrically opposed to his assertion. As discussed *supra*, the bad faith exception provides Liu no shelter. Nor has Liu demonstrated a liberty interest. Assuming only for the sake of argument that a right to pursue one's chosen profession can constitute a liberty or property interest, there is no proof of loss.

Liu alleges that his right to equal protection was violated because the HCQIA and/or Alabama's peer review statutes are unconstitutional as applied to him. This claim is also without merit. Because neither the Alabama statutes nor the federal statute "burdens a fundamental right nor targets a suspect class" each is constitutional "so long as it bears a rational relationship to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 1627, 134 L. Ed. 2d 855 (1996). Physicians and/or teaching physicians are not members of a suspect class. Both statutes bear a rational relationship to the legitimate interest of preventing spurious medical malpractice lawsuits, encouraging rigorous peer review, and protecting patients. Liu is not

a member of a suspect class, and there was a rational basis for Bourge's actions, particularly in light of the purposes of the pertinent statutes. Accordingly, Liu's equal protection claim is due to be dismissed.

Viewing the facts in a light most favorable to Liu, there is no set of facts upon which a reasonable jury could find that Liu has been deprived of any federal right for the pursuit of any § 1983 claim.

e. State Law Claims

The court can only assume jurisdiction over Liu's state law claims by an exercise of its supplemental jurisdiction under 28 U.S.C. § 1367(a). Because Liu's federal question claims are being dismissed, the court's jurisdiction over Liu's state law claims is purely discretionary. 28 U.S.C. § 1367(c)(3)("The district courts may decline to exercise supplemental jurisdiction over a claim under [§ 1367(a)] if . . . the district court has dismissed all claims over which it has original jurisdiction."); see also Pintando, 501 F.3d at 1241. The court declines jurisdiction over the state claims and will dismiss them without prejudice.

V. Conclusion

The Board's motion for summary judgment will be granted. Bourge's motion for summary judgment will be granted. Liu's motion for partial summary judgment will be denied.

DONE this 15th day of December, 2008.

s/ William M. Acker
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

Appendix D

42 U.S.C. § 11112. Standards for professional review actions

(a) In general

For purposes of the protection set forth in section 11111 (a) of this title, a professional review action must be taken—

(1) in the reasonable belief that the action was in the furtherance of quality healthcare,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111 (a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing

A healthcare entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action

The physician has been given notice stating—

(A)

(i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B)

(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating—

(A) the place, time, and date, of the hearing, which date

shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is requested on a timely basis under paragraph (1)(B)—

(A) subject to subparagraph (B), the hearing shall be held (as determined by the healthcare entity)—

(i) before an arbitrator mutually acceptable to the physician and the healthcare entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right—

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment

of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved has the right—

(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the healthcare entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section.

(c) Adequate procedures in investigations or health emergencies

For purposes of section 11111 (a) of this title, nothing in this section shall be construed as—

(1) requiring the procedures referred to in subsection

(a)(3) of this section—

(A) where there is no adverse professional review action taken, or

(B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or

(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

42 U.S.C. § 11135. Duty of hospitals to obtain information

(a) In general

It is the duty of each hospital to request from the Secretary (or the agency designated under section 11134 (b) of this title), on and after the date information is first required to be reported under section 11134 (a) of this title)— [1]

(1) at the time a physician or licensed healthcare practitioner applies to be on the medical staff (courtesy or otherwise) of, or for clinical privileges at, the hospital,

information reported under this sub-chapter concerning the physician or practitioner, and

(2) once every 2 years information reported under this sub-chapter concerning any physician or such practitioner who is on the medical staff (courtesy or otherwise) of, or has been granted clinical privileges at, the hospital.

A hospital may request such information at other times.

(b) Failure to obtain information

With respect to a medical malpractice action, a hospital which does not request information respecting a physician or practitioner as required under subsection (a) of this section is presumed to have knowledge of any information reported under this sub-chapter to the Secretary with respect to the physician or practitioner.

(c) Reliance on information provided

Each hospital may rely upon information provided to the hospital under this chapter and shall not be held liable for such reliance in the absence of the hospital's knowledge that the information provided was false.

42 U.S.C. § 11137. Miscellaneous provisions

(b) Confidentiality of information

(1) In general

Information reported under this sub-chapter is considered confidential and shall not be disclosed (other than to the physician or practitioner involved) except with respect to professional review activity, as necessary to carry out subsections (b) and (c) of section 11135 of this title (as specified in regulations by the Secretary), or in accordance with regulations of the Secretary promulgated pursuant to subsection (a) of this section. Nothing in this subsection shall prevent the disclosure of such information by a party which is otherwise authorized, under applicable State law, to make such disclosure. Information reported under this sub-chapter that is in a form that does not permit the identification of any particular healthcare entity, physician, other healthcare practitioner, or patient shall not be considered confidential. The Secretary (or the agency designated under section 11134 (b) of this title), on application by any person, shall prepare such information in such form and shall disclose such information in such form.

(3) Use of information

Subject to paragraph (1), information provided under

section 11135 of this title and subsection (a) of this section is intended to be used solely with respect to activities in the furtherance of the quality of healthcare.

Appendix E

IN THE UNITED STATES DISTRICT COURT

NORTHERN DIVISION OF ALABAMA

SOUTHERN DIVISION

CIVIL ACTION NO. 2:07-AR-0381-S

MING WEI LIU,

Plaintiff

vs.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA and ROBERT C. BOURGE,

Defendants.

DEPOSITION

OF

MING WEI LIU

February 14, 2008

REPORTED BY: Sabrina Lewis, CCR, RDR

1.A.Yes. USC has two major hospitals.
2. One is USC University
3 Hospital, And that's the one I had
4 problems with.
5 But USC also has another
6 hospital called LAC USC Medical Center.
7 Basically, it's an LA County hospital run
8 by physicians from USC. And that was a
9 county hospital, so that's where I got my
10 initial privilege approved.
11 And then there's a St. Vincent
12 in LA, not in Birmingham. There is
13 Garfield Medical Center in Monterey Park,

which is very close to LA downtown. There is California Hospital Medical Center, which is also in LA.

Appendix F

ARTICLE XI. IMMUNITY AND RELEASES

11.1 EFFECT OF APPLICATION FOR STAFF MEMBERSHIP AND CLINICAL PRIVILEGES

By applying for appointment or reappointment to the Staff, or for advancement in Staff category, or for particular clinical privileges or changes in clinical privileges, the applicant:

(a) Authorizes Governing Body, UABHS Clinical Facilities, The Board of Trustees of the

University of Alabama, 1-15F directors, officers, employees and agents ("Representatives") to solicit and act upon information, including otherwise privileged or confidential information, provided by third parties bearing on the applicant's credentials and agrees that any information so provided shall not be required to be disclosed to the applicant if the third party providing such information does so on the condition that it be kept confidential;

(b) Authorizes third parties to release information, including otherwise privileged or confidential information, as well as reports, records, statements, recommendations and other documents in their possession, bearing on the applicant's credentials to any Representative and consents to the inspection and procurement by any Representative of such information, records and other documents;

(c) Authorizes the Representatives to release such

information to other hospitals, health care facilities and their agents, who solicit such information (either directly or through delegated credentialing activities UABHS Clinical Facilities) for the purpose of evaluating the individual's professional qualifications pursuant to the individual's request for appointment, reappointment or clinical privileges;

(d) Agrees to appear for a personal interview at any reasonable time requested by any Representative;

(e) Consents to the reporting by any Representative of information to the National Practitioner Data Bank which such representative believes in good faith is required by law to be reported;

(f) Releases from any liability: (i) all Representatives for their acts performed in connection with evaluating the applicant's credentials or releasing information to other institutions for the purpose of evaluating the applicant's credentials, in compliance with the Bylaws; and (ii) all third parties who provide information, including otherwise privileged or confidential information, to the Representatives concerning the applicant's credentials, unless such information is false and the third party providing it knew it was false;

(g) Agrees that, if any adverse decision is made with respect to the applicant, (i) the applicant will follow and exhaust the remedies afforded by the Bylaws as a prerequisite to any other action, and (ii) the applicant will have the burden of demonstrating that the applicant meets the standards for appointment or continued appointment to the Staff or for the clinical privileges requested;

(h) Agrees that the foregoing provisions are in addition to any agreements, understandings, covenants, waivers, authorizations or releases provided by law or contained in any application or request forms.

11.2 IMMUNITY FROM LIABILITY

(a) By applying for and/or accepting appointment to the Staff and by applying for, accepting and/or exercising clinical privileges within UABHS Clinical Facilities, each applicant extends absolute immunity to. and releases from all claims, damages and liability whatsoever:

(i) The Governing Body, UAB, UABHS Clinical Facilities and their representatives ("Representatives") for any action taken or statement or recommendation made by any Representatives within the scope of their responsibilities, including disclosures made to other health care facilities pursuant to the Bylaws;

(ii) Any third party for releasing or disclosing information, including otherwise privileged or confidential information, to any Representative concerning any former or current applicant unless such information is false and the third party providing it knew it was false.

(b) The immunity provided by the Bylaws shall apply to all acts, communications, reports, recommendations, or disclosures performed or made in connection with activities of UABHS Clinical Facilities, including, but not limited to:

(i) applications for appointment and/or clinical privileges:

(ii) periodic reappraisals undertaken for reappointment or for changes in clinical privileges;

(iii) evaluating requests for changes in medical staff category or clinical privileges:

(iv) adverse action;

(v) hearings and appellate review;

(vi) patient care audits;

(vii) medical care evaluations;

(viii) utilization reviews;

(ix) other UABHS Clinical Facilities activities related to monitoring and maintaining quality patient care and appropriate professional conduct;

(x) matters or inquires concerning the credentials of any applicant;

(xi) matters directly or indirectly affecting patient care or the efficient operations of UABHS Clinical Facilities; and

(xii) reports to the National Practitioner Data Bank.

Appendix G

NATIONAL PRACTITIONER DATA BANK GUIDEBOOK

Chapter A Introduction NPDB Guidebook

Title IV are to be imposed in the same manner as other civil money penalties pursuant to §1128A of the Social Security Act, 42 U.S.C. 1320a-7a. Regulations governing civil money penalties under §1128A are set forth at 42 CFR Part 1003.

For each violation of confidentiality, a civil money penalty of up to $11,000 can be levied. In any case in which it is determined that more than one party was responsible for improperly disclosing confidential information, a penalty of up to the maximum $1 1,000 limit can be imposed against each responsible individual, entity, or organization.

Persons or entities who receive

information from the NPDB either directly or indirectly are subject to the confidentiality provisions and the imposition of a civil money penalty if they violate those provisions. When an authorized agent is designated to handle NPDB queries, both the entity and the agent are required to maintain confidentiality in accordance with Title IV requirements.

The Privacy Act, 5 USC §552a, protects the contents of Federal systems of records on individuals, like those contained in the NPDB, from disclosure without the individual's consent, unless the disclosure is for a routine use of the system of records as published annually in the

Federal Register. The published routine uses of NPDB information, which are based on the laws and the regulations under which the NPDB operates, do not allow disclosure to the general public.

The limited access provision of the Health Care Quality Improvement Act of 1986, as amended, supersedes the disclosure requirements of the Freedom of

Information Act (FOIA), 5 USC §552, as amended.

The confidentiality provisions of Title IV do not prohibit an eligible entity receiving information from the NPDB to disclose the information to others who are part of the peer review process, as long as the information is used for the purpose for which it was provided. Examples of appropriate uses of NPDB information include:

> A hospital may disclose the information it receives from the NPDB to hospital officials responsible for reviewing a practitioner's application for a medical staff appointment or clinical privileges. In this case, both the hospital officials who receive the information and the hospital officials who subsequently review it during the employment

process are subject to the confidentiality provisions of Title IV.

A private accreditation entity can review confidential information that a health care entity has obtained regarding its practitioners only if the purpose of the disclosure is to carry out peer review activity for that health care entity (i.e., the private accreditation entity maintains a role in the decision-making process for practitioner membership in the health care entity, which would make its activities part of the peer review process). If the private accreditation entity's activities are not considered part of the peer review process, the private accreditation entity cannot view any documents that the health care entity has obtained from the NPDB that show the results of an NPDB query (e.g., match or no match), such as an NPDB report . . . .

Appendix H

MING WEI LIU ** CONTAINS CONFIDENTIAL PORTIONS ** MING WEI LIU HOARD 07 TRUSTEES OF THE UNIVERSITY OF ALABAMA, ET Al. FOR ATTORNEYS' EYES ONLY February 14, 2008

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A.. Yes. USC has two major hospitals. One is USC University Hospital. And that's the one I had problems with.

But USC also has another hospital called LAC USC Medical Center. Basically, it's an LA County hospital run by physicians from USC. And that was a county hospital, so that's where I got my

initial privilege approved.

And then there's a St. Vincent in LA, not in Birmingham. There is Garfield Medical Center in Monterey Park, which is very close to LA downtown. There is California Hospital Medical Center, which is also in LA.

Q. Did you get on staff at any of these hospitals other than USC Medical Center?

A.. I -- after -- after a number of years struggling, USC decided that I need to get some credentials. And they say, "If you go outside, join the private practice, while you're in the private practice, you can use that as your credential and come back and apply for USC University Hospital privilege." So it was agreed by the chief of cardiology, and it

was agreed by the department of medicine that I need to just go out and join a private practice and after one year come back.

So I just did that. And what happened is I joined a group that is more influential. So they basically helped me to get the privilege even though with great difficulties because the letter that Bob Bourge wrote. I have to go through the credential committee. I have to go through personal interview. I have to get recommendation from -- you know, from different people before they approve me. But each time, each time it was -- it was to me, it was very risky. Because once they decide to process your application, they will tell -- they will tell me that, "If you decide to proceed

and the credential committee does not approve, it will be reported to the state." And that will be more problem for me.

And I'm just lucky so far with all kind of help I have, that I am able to get the approval from different hospitals. And every hospital, I had to go through different resources to prove that, indeed, my clinical performance is up to the standards; it's not like what they said in that letter.

Q. Tell me what your job is now.

A.. Well, I joined a small cardiology group. And the guy got an offer -- the major guy got an offer in a different place. So basically, he left. So the group just disappeared. And so I'm basically on my own right now. So I'm in

solo private practice basically.
And what happened was that the
USC wanted to take me back. But when
we -- when department of medicine asked me
to reapply, the University Hospital said
exactly the same thing: "We need
documents from UAB."
And the chief of the staff, the
committee chairman met with
Pohost and say, "You need to tell Dr. Liu
he need to go back to sue UAB." That's
exactly words from USC people. And the
department of medicine tell me, "You know,
we can't take you back. You just don't
have the privilege." So that cuts off my
career. Stop right there.
Q. Where do you have staff
privileges now?
A.. I have staff privilege in

White Memorial Medical Center, at

Adventist, Good Samaritan, St. Vincent

--at LA, not here; California Hospital

Medical Center, and Garfield Medical

Center.

And the reason I have to go all

that is because the group used to cover

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Supreme Court, U.S.
FILED
NOV 24 2009
OFFICE OF THE CLERK

No. 09-358

In The
Supreme Court of the United States

MING WEI LIU,

Petitioner,

v.

ROBERT C. BOURGE,

Respondent.

On Petition For Writ Of *Certiorari*
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Petitioner seeks *certiorari* solely because he fails to accept the lower courts' factual findings and application of settled law. In his Questions Presented for Review, however, Petitioner asserts that this case involves landmark questions of federal law. It does not.

Respondent submits the following Counter-Statement of Questions Presented to describe appropriately the pedestrian argument for Supreme Court review:

1. Whether the Eleventh Circuit Court of Appeals properly affirmed summary judgment for Respondent finding that Respondent's invocation of Alabama's peer review privilege did not violate the Supremacy Clause of the United States Constitution.

2. Whether the Eleventh Circuit Court of Appeals properly affirmed the District Court's finding that Respondent's refusal to produce peer review materials and publication of the negotiated recommendation letter did not deprive Petitioner of the right to pursue his chosen profession.

THE PARTIES

1. Petitioner Ming Wei Liu ("Dr. Liu" or "Petitioner") is an interventional cardiologist formerly employed as an Associate Professor at the School of Medicine at the University of Alabama at Birmingham.

2. Respondent Robert C. Bourge ("Dr. Bourge" or "Respondent") is the Director of Cardiovascular Disease for the Department of Medicine at the University of Alabama at Birmingham.

3. The Board of Trustees of the University of Alabama, a body corporate, (the legal name, *inter alia*, for UAB) was awarded summary judgment by the District Court. Petitioner did not appeal from that judgment. UAB was not a party in the Eleventh Circuit proceedings and is not named as a party in the pending petition. Some confusion may arise from the Board's appearance in the case caption on the Court's docket.

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OPINIONS BELOW

The District Court's Memorandum Opinion and Order granting summary judgment to Respondent on all of Petitioner's federal claims is unreported and included as Exhibit C in the Appendix to the Petition. Being unremarkable, the Order of the Court of Appeals affirming the District Court's grant of summary judgment to Respondent is also unreported and included as Exhibit A in the Appendix to the Petition. The Court of Appeals' Order denying Petitioner's request for panel rehearing is unreported and is included as Exhibit B in the Appendix to the Petition.

JURISDICTION

The decision of the Eleventh Circuit Court of Appeals to be reviewed was filed May 19, 2009. Panel rehearing was denied on June 23, 2009. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The petition contains the relevant Alabama statutes governing nondisclosure of peer review materials (Pet. 4-5), but omits the relevant portions of the Healthcare Quality Improvement Act. Those provisions, and the relevant regulations, are included as

Exhibit A in the Supplemental Appendix attached to this Brief in Opposition.

STATEMENT OF THE CASE

Dr. Liu's hospital privileges at UAB were summarily suspended because of assertions that he failed to comply with the standard of care. Dr. Liu thereafter chose to resign while under suspension, yielding an automatic report to the National Practitioner Data Bank ("Data Bank"). In seeking subsequent employment in California, Dr. Liu's Data Bank report triggered additional inquiry into the circumstances of his practice in Alabama. Dr. Liu applied to the University of Southern California ("USC") and USC sought additional information, as well as medical records, relevant to the summary suspension of Dr. Liu's privileges. UAB declined to provide medical records, as required by Alabama's Medical Peer Review Privileges, ALA. CODE §§ 6-5-333 and 22-21-8.

USC and Dr. Liu requested an explanatory letter, which UAB provided. The letter was negotiated between counsel for Dr. Liu and counsel for The University of Alabama Health Services Foundation.[1] USC apparently found the letter inadequate to

[1] The University of Alabama Health Services Foundation is a 501(c)(3) non-profit organization operating a group practice at UAB. It has not been a party to this case at any time.

resolve Dr. Liu's pending application and continued to seek medical records. The District Court carefully detailed the facts as reflected in the record upon cross-motions for summary judgment. Pet. Ex. C at 53-78.

On February 28, 2007, Dr. Liu commenced this action against the Board of Trustees of the University of Alabama and Dr. Robert C. Bourge, who was Dr. Lui's supervisor. Dr. Liu claims that the invocation of Alabama's peer review privilege deprived him of substantive and procedural due process rights and that the privilege did not apply in federal court. Following discovery, the parties cross-moved for summary judgment. On December 15, 2008, the District Court granted summary judgment in favor of Defendants Dr. Bourge and UAB on the federal claims and declined supplementary jurisdiction over state law claims purportedly arising under both Alabama and California law.

Dr. Liu appealed to the Eleventh Circuit, which affirmed the District Court in an unpublished *per curiam* Opinion.[2] Next, Liu sought a rehearing before the Panel which was denied on June 23, 2009. His Petition for a Writ of *Certiorari* then followed.

---

[2] Pursuant to Eleventh Circuit Rule 36-2, unpublished opinions do not have precedential value.

ARGUMENT

THE PETITION FOR WRIT OF *CERTIORARI* SHOULD BE DENIED

I. The Petition Contains No Basis For Granting the Writ.

Review on a writ of *certiorari* is discretionary and a "petition for a writ of certiorari will be granted only for a compelling reason." Sup. Ct. R. 10. Here, Dr. Liu fails to offer any compelling reason for this Court to grant his Petition for a Writ of *Certiorari*.

Certiorari is unwarranted foremost because there is no conflict among the circuits regarding any of the questions presented. Instead, this matter involves the application of established (and undisputed) legal doctrines to the particular facts of this case. The absence of any circuit split is reason enough to deny the petition.

Second, the form of the Eleventh Circuit's Opinion, *per curiam* and unpublished, confirms that the Opinion has limited precedential value for future litigants. Indeed, the Opinion has uncertain value even as between these parties because UAB was not a party on appeal and is no longer a party to this proceeding. At this juncture, only injunctive relief is sought as against Dr. Bourge.[3]

---

[3] As the district court observed: "Even an injunction against Bourge in his official capacity would prove difficult, if not impossible, to enforce if it should mandate that Bourge disgorge

(Continued on following page)

Moreover, this case does not merit *certiorari* because it turns on peculiar and novel facts. First, Dr. Liu's decision to resign while his privileges were suspended was made upon the advice of his own counsel. Rather than complete the "due process" procedures to defend the challenge to his privileges, Dr. Liu elected to forfeit in the forum provided to him.[4] He failed to answer the serious allegations against his practice. Second, Dr. Liu characterizes the recommendation letter as a "back channel" effort to deprive him of the right to practice academic medicine. Pet. at 20. Yet the facts are undisputed that USC and Dr. Liu requested that the recommendation letter be prepared and Dr. Liu's own counsel participated in the letter's preparation and suggested some changes to it, which UAB adopted.

II. The Decision Below is Correct.

The petition for *certiorari* challenges the Eleventh Circuit's affirmation of the District Court's grant of summary judgment for a variety of meritless reasons. In essence, Petitioner quarrels with the lower courts' conclusion that the Alabama peer review statutes do not interfere with the HCQIA and

---

peer review materials that are not in his custody or control." Pet. Ex. C at 91-92. There is nothing in the record to suggest that Dr. Bourge controls any of the records at issue.

[4] The irony of Dr. Liu's litigation is that he apparently seeks to defend his practice decisions in California when he had abandoned that option in Alabama.

disagrees with the fact-based determination that Dr. Bourge did not violate Dr. Liu's due process rights by invoking the peer review privilege and refusing to produce peer review materials. As demonstrated below, the Court of Appeals properly affirmed the District Court's decision to grant summary judgment in favor of Dr. Bourge, and thus, Dr. Liu's arguments do not justify issuance of a writ of *certiorari*.

A. The District Court and Court of Appeals Properly Determined That Respondent's Invocation of the Alabama Peer Review Privilege Did Not Violate Petitioner's Rights Under the HCQIA or the Fourteenth Amendment.

Dr. Liu argues that Dr. Bourge violated his rights under the HCQIA and the Fourteenth Amendment by invoking the Alabama peer review privilege, refusing to disclose peer review materials to USC, and sending the recommendation letter instead. Dr. Liu's arguments are unworthy of *certiorari* to this Court.

1. The Courts Below Properly Determined that Nothing in the HCQIA Requires the Disclosure of Peer Review Materials Sought by Petitioner.

Relying on everything but the text of the HCQIA and the regulations interpreting it, Dr. Liu argues that the lower courts incorrectly determined that the

HCQIA does not require the disclosure of peer review materials he seeks. Pet. at 11-28. As explained by the lower courts, Dr. Liu's argument is without merit.

By enacting the HCQIA, Congress established channels for peer review bodies to disseminate information pertaining to physicians' credentials with the primary intent of protecting patients from incompetent physicians relocating from state to state ahead of state licensing authorities. 42 U.S.C. §§ 11101(2), 11137(b)(1); Pet. Ex. A at 42. To achieve this purpose, the HCQIA requires that peer review bodies make certain disclosures to the National Practitioner Data Bank and mandates the confidentiality of such information unless state law provides otherwise. 42 U.S.C. § 11133(a)(3).

The HCQIA requires that peer review bodies report to the Data Bank (1) the name of the physician or practitioner involved in the peer review; (2) a description of the acts or omissions or other reasons for the action or, if known, for the surrender; and (3) such other information regarding the circumstances of the action or surrender as the Secretary deems appropriate. 42 U.S.C. § 11133(a)(3); Pet. Ex. A at 42 n.4. As the Court of Appeals correctly found, "Nothing in the HCQIA mandates that healthcare entities provide peer review information to credentialing authorities in other states in *excess* of the information required to be reported to the NPDB." Pet. Ex. A at 44-45; 45 C.F.R. § 60.9 (2006) (information to be

reported to Data Bank); 45 C.F.R. § 60.10 (2006) (information reported out by Data Bank).[5]

Since the HCQIA does not require the production of the peer review materials Dr. Liu seeks, there logically can be no conflict between the HCQIA and the Alabama peer review statutes, which mandate the confidentiality of peer review materials. ALA. CODE §§ 6-5-333; 22-21-8. Since there is no conflict between the Alabama peer review statutes and the HCQIA, Dr. Bourge's invocation of the peer review statutes does not violate the Supremacy Clause. This issue merits no further consideration by the Court.

---

[5] Dr. Liu argues that Dr. Bourge wrongly invoked the Alabama peer review statutes which he claims are "facially inapplicable." Pet. at 13. The Court of Appeals found it unnecessary to decide whether Dr. Bourge's invocation of the Alabama peer review privileges was proper because Dr. Bourge was not required by the HCQIA to produce the peer review materials in the first place. Pet. Ex. A at 44. The District Court rejected Dr. Liu's argument and concluded that Dr. Bourge's invocation of the peer review privilege was proper because the sweeping language in the statutes "demonstrates that the Alabama legislature intended an almost hermetically sealed status for all peer review documents." Pet. Ex. C at 117. Regardless of whether or not Dr. Bourge properly invoked the Alabama peer review statutes, the result is the same – Dr. Bourge's nondisclosure does not violate the Constitution because nothing in the HCQIA or any other law requires the disclosure of peer review materials Dr. Liu seeks.

2. The District Court and Court of Appeals Correctly Found That Dr. Bourge Did Not Violate Dr. Liu's Substantive Due Process Rights.

Dr. Liu disagrees with the lower courts' conclusion that Dr. Bourge did not deprive him of the right to work as a cardiologist or medical educator and seeks a third bite at the apple to prove that Dr. Bourge "unconstitutionally blacklisted" him through "backchannel" communications (which his own legal counsel negotiated on his behalf) of allegedly false information to USC. Pet. at 29-33. As determined by the lower courts, Dr. Bourge obviously did not deprive Dr. Liu of his right to work as a medical educator or cardiologist because Dr. Liu is, in fact, currently working as a medical educator and cardiologist.[6]

This Court has recognized that the liberty component of the Fourteenth Amendment's Due Process Clause includes the right to pursue a profession. *See, e.g.*, *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999) (stating that there is "some generalized due process right to choose one's field of private employment"). However, in order to prove that he has been deprived

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[6] Dr. Liu originally claimed that he was "blacklisted" from practicing as an interventional cardiologist. He later claimed that he was deprived of the right to practice as a medical educator. Regardless of his claimed profession *du jour*, it is undisputed that Dr. Liu is currently employed as an interventional cardiologist and medical educator at several hospitals in California. Pet. Ex. A at 48; Pet. Ex. C at 121.

of the right to pursue his profession, Dr. Liu must establish that he is completely precluded from practicing as a medical educator or cardiologist. *Id.* at 292 (noting that the cases which recognize violation of this right "all deal with a complete prohibition of the right to engage in a calling, and not a sort of brief interruption"); *Clemons v. Dougherty County, Ga.*, 684 F.3d 1365, 1371 (11th Cir. 1982) (reiterating that in order to prove a deprivation of liberty interest in one's profession, a plaintiff must establish that the state employer made "stigmatizing charges which foreclose his freedom to take advantage of other employment opportunities").

As the District Court and Court of Appeals both properly determined after careful review of the evidence and established law, Dr. Liu's substantive due process claim fails because he is currently working as a medical educator and interventional cardiologist and has been granted staff privileges at several hospitals in California. Pet. Ex. A at 48; Pet. Ex. C at 121. Since he is working as a medical educator and interventional cardiologist, he clearly has not been "blacklisted" and deprived from working in these professions. Moreover, Dr. Liu cannot be heard to complain about the "stigmatizing" effects of the Data Bank report when he knew that UAB would be required to report to the Data Bank that he chose to resign while his privileges were under suspension. Finally, the recommendation letter sent by Dr. Bourge was requested by Dr. Liu and his attorney, who also

negotiated the text of the letter. There is simply no merit to Dr. Liu's due process argument.[7]

CONCLUSION

Petitioner failed to meet his burden to demonstrate a compelling reason why the writ should be granted. Accordingly, the petition should be denied.

Respectfully submitted,

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[7] Alternatively, summary judgment for Dr. Bourge was proper because Dr. Liu's claims are barred by the numerous releases he signed in which he agreed to release UAB and its employees from any and all liability arising from disclosure of information. Although this argument was fully briefed at summary judgment and on appeal, neither the District Court nor the Court of Appeals addressed it in their opinions. The releases provide an independent rationale for affirming the decisions of the lower courts and further illustrate why the petition for *certiorari* should be denied.

SUPPLEMENTAL APPENDIX
Exhibit A

42 U.S.C. § 11101. Findings

The Congress finds the following:

(1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.

(2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.

(3) This nationwide problem can be remedied through effective professional peer review.

(4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.

(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

42 U.S.C. § 11133. Reporting of certain professional review actions taken by health care entities

(a) Reporting by health care entities.

(1) On physicians. Each health care entity which –

(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days;

(B) accepts the surrender of clinical privileges of a physician –

(i) while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, or

(ii) in return for not conducting such an investigation or proceeding; or

(C) in the case of such an entity which is a professional society, takes a professional review action which adversely affects the membership of a physician in the society, shall report to the Board of Medical Examiners, in accordance with section 424(a), the information described in paragraph (3).

* * *

(3) Information to be reported. The information to be reported under this subsection is –

(A) the name of the physician or practitioner involved,

(B) a description of the acts or omissions or other reasons for the action or, if known, for the surrender, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

* * *

(c) Sanctions.

(1) Health care entities. A health care entity that fails substantially to meet the requirements of subsection (a)(1) shall lose the protections of section 411(a)(1) if the Secretary publishes the name of the entity under section 411(b).

* * *

45 C.F.R. §60.9 Reporting adverse actions on clinical privileges.

(a) Reporting to the Board of Medical Examiners – (1) Actions that must be reported and to whom the report must be made. Each health care entity must report to the Board of Medical Examiners in the State in which the health care entity is located the following actions:

(i) Any professional review action that adversely affects the clinical privileges of a physician or dentist for a period longer than 30 days;

(ii) Acceptance of the surrender of clinical privileges or any restriction of such privileges by a physician or dentist –

(A) While the physician or dentist is under investigation by the health care entity relating to possible incompetence or improper professional conduct, or

(B) In return for not conducting such an investigation or proceeding; or

(iii) In the case of a health care entity which is a professional society, when it takes a professional review action concerning a physician or dentist.

(2) Voluntary reporting on other health care practitioners. A health care entity may report to the Board of Medical Examiners information as described in paragraph (a)(3) of this section concerning actions

described in paragraph (a)(1) in this section with respect to other health care practitioners.

(3) What information must be reported. The health care entity must report the following information concerning actions described in paragraph (a)(1) of this section with respect to the physician or dentist:

(i) Name,

(ii) Work address,

(iii) Home address, if known,

(iv) Social Security number, if known, and if obtained in accordance with section 7 of the Privacy Act of 1974,

(v) Date of birth,

(vi) Name of each professional school attended and year of graduation,

(vii) For each professional license: the license number, the field of licensure, and the name of the State or Territory in which the license is held,

(viii) Drug Enforcement Administration registration number, if known,

(ix) A description of the acts or omissions or other reasons for privilege loss, or, if known, for surrender,

(x) Action taken, date the action was taken, and effective date of the action, and

(xi) Other information as required by the Secretary from time to time after publication in the Federal Register and after an opportunity for public comment.

(b) Reporting by the Board of Medical Examiners to the National Practitioner Data Bank. Each Board must report, in accordance with Sec. Sec. 60.4 and 60.5, the information reported to it by a health care entity and any known instances of a health care entity's failure to report information as required under paragraph (a)(1) of this section. In addition, each Board must simultaneously report this information to the appropriate State licensing board in the State in which the health care entity is located, if the Board is not such licensing board.

(c) Sanctions – (1) Health care entities. If the Secretary has reason to believe that a health care entity has substantially failed to report information in accordance with Sec. 60.9, the Secretary will conduct an investigation. If the investigation shows that the health care entity has not complied with Sec. 60.9, the Secretary will provide the entity with a written notice describing the noncompliance, giving the health care entity an opportunity to correct the noncompliance, and stating that the entity may request, within 30 days after receipt of such notice, a hearing with respect to the noncompliance. The request for a hearing must contain a statement of the material factual issues in dispute to demonstrate that there is cause for a hearing. These issues must be both substantive and relevant. The hearing will be

held in the Washington, DC, metropolitan area. The Secretary will deny a hearing if:

(i) The request for a hearing is untimely,

(ii) The health care entity does not provide a statement of material factual issues in dispute, or

(iii) The statement of factual issues in dispute is frivolous or inconsequential.

In the event that the Secretary denies a hearing, the Secretary will send a written denial to the health care entity setting forth the reasons for denial. If a hearing is denied, or if as a result of the hearing the entity is found to be in noncompliance, the Secretary will publish the name of the health care entity in the Federal Register. In such case, the immunity protections provided under section 411(a) of the Act will not apply to the health care entity for professional review activities that occur during the 3-year period beginning 30 days after the date of publication of the entity's name in the Federal Register.

(2) Board of Medical Examiners. If, after notice of noncompliance and providing opportunity to correct noncompliance, the Secretary determines that a Board has failed to report information in accordance with paragraph (b) of this section, the Secretary will designate another qualified entity for the reporting of this information.

(Approved by the Office of Management and Budget under control number 0915-0126)

[54 FR 42730, Oct. 17, 1989, as amended at 59 FR 61555, Dec. 1, 1994]

45 C.F.R. § 60.10 Information which hospitals must request from the National Practitioner Data Bank.

(a) When information must be requested. Each hospital, either directly or through an authorized agent, must request information from the Data Bank concerning a physician, dentist or other health care practitioner as follows:

(1) At the time a physician, dentist or other health care practitioner applies for a position on its medical staff (courtesy or otherwise), or for clinical privileges at the hospital; and

(2) Every 2 years concerning any physician, dentist, or other health care practitioner who is on its medical staff (courtesy or otherwise), or has clinical privileges at the hospital.

(b) Failure to request information. Any hospital which does not request the information as required in paragraph (a) of this section is presumed to have knowledge of any information reported to the Data Bank concerning this physician, dentist or other health care practitioner.

(c) Reliance on the obtained information. Each hospital may rely upon the information provided by the Data Bank to the hospital. A hospital shall not be

held liable for this reliance unless the hospital has knowledge that the information provided was false.

(Approved by the Office of Management and Budget under control number 0915-0126)